Supreme Court, U.S.
Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1995

TOM SHAW, INC.,

Petitioner,

v.

TOGO WEST,
SECRETARY OF THE ARMY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS R. HUNGERFORD (P40000)
Attorney for Petitioner
3857 S. Straits Hwy.
P.O. Box 849
Indian River, MI 49749
(616)238-4333

QUESTIONS FOR REVIEW

I. A TERMINATION FOR THE GOVERNMENT'S CONVENIENCE CONVERTS A FIXED PRICE CONTRACT TO A COST REIMBURSABLE CONTRACT.

II. CONTRACT CLAUSE SP.33 IS APPLICABLE TO A TERMINATION FOR CONVENIENCE PRICING ACTION.

SIGNIFICANCE OF CASE

Tom Shaw, Inc. is a small business that had a bonding capacity of $9,000,000 at the time of its contract with the U.S. Corps of Engineers. Presently, Tom Shaw, Inc. is in chapter 7, has no bonding capacity, its credit rating is non-existent and in the process of being forced to liquidate. Tom Shaw, Inc. has not been fully reimbursed for the work performed in this contract, due to misinterpretation of the contract and termination for convenience clause.

This case has great significance since the Engineering Board of Contract Appeals and the U.S. Court of Appeal for the Federal Circuit has misinterpretated and committed a major error of law in their interpretation and appreciation of a termination of convenience by a Governmental Unit. It is the petitioner's

position that the interpretation issued on this contract by Engineering Board of Appeals and the U.S. Court of Appeals for the Federal Circuit is a bizarre twist of the existing case law and is conflict with other decisions of the court and federal regulations including both Federal Acquisition Regulations, ("FAR"), and Defense Acquisitions Regulations, ("DAR").

Additionally, the court is being asked to review a section of the specification contract , SP-33, that relates to completion of equipment rates for the purpose calculating

equipment costs in termination settlement proposal. This issue has never been addressed by this court and if heard will give the lower court's guidance in termination for convenience clauses in most governed Government contracts. A n d finally, this petition, if left in its

present states, not only affects Tom Shaw, Inc. but all other small businesses, who have entered into work for the Government. Termination for convenience is not an open season for the Government to dishonor its contractual obligations.

As part of termination for convenience clause, the Government has the right to stop any contract in progress for whatever reason. But as a result of this right, the Government must make the aggrieved contractor financially whole again in a timely manner. Case law has tested this legal proposition and until this case has always supported the aggrieved partly due to the Government's unfettered power and ability to terminate contracts.

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Assignment by Chapter 7 trustee termination contract claim to Tom Shaw.

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Judge Charles Sheridan's Opinion and Termination for Convenience Clause on page 80.

Yellow Appendix:
Judgement of U.S. Court of Appeals for Federal Circuit.

Green Appendix:
Tom Shaw, Inc. 90-1 BCA 22,580.

Blue Appendix:
Construction contract and SP.33.

TABLE OF CASES AND AUTHORITIES

Blount Bro's Corp. v. U.S., 872 F2d 1003 (Fed. Cir. 1989)

Caskel Forge, Inc., 1962 BCA ¯3318

Codex Corp. v. U.S., 226 Ct. Cl. 693 (1981)

Corliss Steam Engine Co. v. U.S., 916 S. Ct. 321 (1871)

Kalvar Corp. v. U.S., 543 F.2d 1298 (Ct. Cl. 1976)

Lisbon Contractors, Inc., v. U.S., 543 F.2d 1298 (ct. Cl. 1976)

M.E. Brown, 91-1 BCA ¯23,293

Maxima Corp. v. U.S., 847 F.2d 1549 (Fed. Cir. 1988)

Melvin Wilner v. U.S., Slip Opinion No. 92-5161

(Fed. Cir. 5/24/93)

New York Shipbuilding Co., 73-1 BCA ¯9852

Paul E. McCallum, Sr., 81-2 BCA ¯15,311

R.G. Robbins & Co., Inc., 83-1 BCA ¯16,420

R.H.J. Corp., 69-1 BCA ¯7587

Scope Electronics, Inc., 77-1 BCA ¯12,404; recon denied 77-2 BCA ¯12,586

Tom Shaw, Inc., 90-1 BCA ¯22,580

Torncello v. U.S., 681 F.2d 756 (Fed. Cir. 1982)

Wolfe Constr. Co., 88-3 BCA ¯22,122

STATEMENT OF JURISDICTION

Tom Shaw, Inc. appealed the January 26, 1993 Engineering Board of Contract Appeals ("Eng BCA" or "Board") decision by Administrative Law Judge Charles J. Sheridan which denied in part Tom Shaw's $10.3 million appeal from the final decision of the contracting officer that denied Tom Shaw additional termination for convenience costs. The United States Court of Appeals for the Federal Circuit in a judgment dated November 14, 1994, affirmed the opinion of the Eng BCA. Tom Shaw, Inc. is requesting that this court grant a petition for a writ of certiorari to review the judgment entered by U.S. Court of Appeals for the Federal Circuit. 28 *U.S.C.* 2101

STATEMENT OF THE CASE

Tom Shaw, Inc., ("Shaw" or "Petitioner"), is a small business located in northern Michigan, which employed approximatly 100 people. Currently, Shaw has filed for bankruptcy. See Red Appendix for statement from the trustee. On August 31, 1983, Shaw was awarded a contract for $2,306,24.90 by the U.S. Corps of Engineers, ("Government" or "Respondent"), to quarry and barge 60,000 tons of rip-rap for the main breakwater at Pt. Judith, R.I. See Blue Appendix for a copy of the contract. The contract was later modified to $2,274,749.40. Shaw has been paid $2,742,763.07 for direct costs and $282,550.00 as settlement expenses under termination settlement proposal. Prior to the contract being awarded a pre-award

hearing was held and the Government informed Shaw that about 90% of the work was on the harbor side and only 10% was seaside. Shaw relied upon the Government's representations. Shaw visited the Pt. Judith site prior to its submitting a bid for the contract.

As part of the contract, the Government was to engineer/survey or lay-out the job; however, the centerline had to be reset, which resulted in a major change in the project. Shaw bid the job and anticipated working the project at Point Judith from the calm waters of the harbor side, not the stormy seas of the Atlantic Ocean. The plan and specifications indicated the major work was the repair of the change to the harborside slope of the breakwater. It became apparent after the contract was signed that the harborside was largely intact. This further complicated

Shaw's job. The centerline on the project had to be moved 2 1/2"-10' towards the harborside. (A baseline or centerline may be congruent. The first is simply a line from which measurements are taken and the other is the center of the breakwater). The major part of the work was to the seawardside. This is directly contrary to a reasonable interpretation of the plan and specifications submitted by the Government to be bid. The additional cost of daily work on the seawardside came from having to deal with the oceanic water and wave action, not the peace and tranquility of the ocean water in the harbor. The work shifted from 10% seaside/90% harborside,; as shown on the contract drawings, to 90% seaside/10% harborside. The cost effect of this change was to increase the contract from $2.3 million to $7.6 million. Job change #2 was finally issued in September

of 1984 to cover the necessary changes. No plans or specifications were attached to the job change order. Based upon the production rates, Shaw estimated that the project would require several million more dollars to complete. The original drawings and specifications of the Government detailed approximately 30 pieces of displaced stone that had to be removed so that the Shaw's barges could enter the breakwater. But the real conditions revealed thousand of tons of additional stone. After several meetings with the Government, job order #1 was issued so that the stone could be reused and Shaw could have access to the breakwall.

In addition to the above, the specifications and drawings submitted by the Government were not detailed with regards to the placement of the stone. The original drawings and specifications were

defective and/or ambiguous. Shaw continued work on the project until forced to close the project down due to the weather on Christmas Eve, December 24, 1984.

After several meetings with the Government in late 1984 and early 1985, the Government advised Shaw that the contract was to be terminated for convenience. Work was stopped. However, the Government asked Shaw, as part of the termination for convenience, to load, clean-up and set off the remaining 30,000 tons of stone at the dock on the breakwater.

Shortly thereafter, the termination for convenience directions, mentioned above, were again amended, directing Shaw to remove approximately 10,000 tons of stone. Clean-up work at the quarry was to be stopped. As directed by the Government, Shaw was forced to remobilize during the winter months. During this period, car

float #12, while transporting large boulders between Davisville and Point Judith, RI, capsized. Shortly thereupon, the Government proceeded to issue a termination for default.

Shortly after the termination for default, the Government began an exhausting and expensive investigation of Shaw. After several months of investigation, the Government turned the termination for default into another termination for convenience. This is unprecendented unusual to have two terminations for convenience on the same contract. This decision was made only after Shaw was exonerated of any wrongdoing in two investigations by the Criminal Investigation Division (CID) and by the U.S. Department of Labor (DOL).

As before mentioned, this Petition presents an extraordinary circumstance of

two convenience terminations on the same contract. Two Final Decisions by the Respondent's Contracting Officer, ("CO"), resulted in payment of a sum in excess of the adjusted Contract value. Respondent's position - that payment of actual costs reflected in Petitioner's cost records provides sufficient compensation - has been adopted by the Eng BCA without due regard for DAR S8-301, i.e., strict accounting principles shall not apply; rather, the CO should exercise sound business judgment in deciding what is fair compensation because **fairness** is the controlling principle to be applied. Shaw's economic circumstances at the time of the contract award and the effect of two terminations determination based on the principle of fairness as the primary criterion required by DAR 8-301. The Eng BCA's validation of the Respondent's cost award to Petitioner

provides exclusive endorsement to the strict accounting principles contained in DAR 215 without so much as even a summary discussion of the fairness guidelines given in DAR 8-301.

The Board has made the following findings inconsistent with its position:

(1) The Contract Specifications were exacting yet not precise.

(2) The intended scope of Job Change #2 was vague.

(3) The Government did not disavow its Determination and

Finding ("D & F") issued incident to the initial convenience

termination which stated in part:

(a) A case for termination for default could be made but would be contested by Shaw or Shaw's Surety "on the basis of ambiguous specifications and changes being the cause of the problem."

(b) "Although not in agreement that the low production is due solely to changes or ambiguities, the Government's position is prejudiced by the fact that they do exist."

(4) The same D&F also stated that the Government's position rejecting Petitioner's work for improper placement of stone, was doubtful.

(5) The perpendicularity requirements of the specifications do not use the clearest imaginable language.

The events surrounding the Government's 2/6/85 decision to terminate for convenience, and not default, represent the most compelling evidence bearing on the Board's finding that Petitioner performed little satisfactory work. Those events consist of a 1/9/85 meeting between the parties' representatives who discussed the intent of the specifications. At this

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meeting, Shaw's bonding company, Maryland Casualty, had retained Louis Caccese, retired Chief Construction Division, Corps Philadelphia District, and Frank Vinci, retired Chief Technical Engineering Branch, Corps Philadelphia District. The same Mr. Caccese testified at the trial before the Board as well. Mr. Caccese confirmed his opinions expressed on 1/9/85, to the effect that a changed condition had occurred "based on the fact that 90% of the repair work would have to be performed on the seawardside of the breakwater and 10% of the harborside, compared to 90% on the harborside and 10% on the seawardside as indicated on the Contract drawings." Mr. Caccese estimated this change plus the placement of armor stone would turn a $2,300,000.00 project into a $7,600,000.00 project. Mr. Caccese testified that he would regard this change as having

dramatically different effect on the cost of having to perform work on the seaward side as opposed to the harborside of the breakwater. He also testified that if he were administering the Contract, he would consider that a cardinal change had occurred. The Government's Minutes of this Meeting reveal that the CO directed his staff to prepare pricing under three modes: (1) termination for default; (2) termination for convenience; (3) negotiated agreement for termination.

Subsequent to the 1/9/85 meeting, in a Determination and Finding recommending a termination for convenience, the Government recognized that the Petitioner's interpretation of the phrase "perpendicular to the length" as allowing stone to be placed with their long axis horizontal would probably stand up as being reasonable. The Government concluded that:

(1) Its interests would be served by a termination rather than "to be exposed to the risk of paying an excessive amount to complete the work."

(2) The Government's plans and specifications should be revised to reflect job changes, eliminate ambiguities, and be reissued under a future contract.

It is undisputed that the Government recognized its position regarding rejection of Petitioner's work for improper placement of stone was **doubtful.**

The Board elected to disregard the Government's own admissions and substitute its judgment that Shaw's work, except for 160 feet, was not in conformance with the specifications, admittedly ambiguous, from the Government's perspective, and were admittedly "very exacting yet not precise" from the Board's perspective. The existence of a change was supported by Col.

Sciple's admissions in a letter dated 6/20/85 (1) that Petitioner's claim for additional payment of $1,191,190.90 for moving of the center line, had merit and requested a formal cost proposal; (2) that Petitioner was performing work beyond the scope of the contract under a second claim filed in 11/84 involving requirements governing the method of placing and inter locking stones on the breakwater.

These admissions were glossed over by the Board's findings that he would change in the centerline "reduced" the amount of work Petitioner would perform. Such findings are contrary to the contemporaneous documentation issued not by Shaw, but by the Respondent itself. Such findings ignore the countervailing facts that it was Respondent which erred in performing the survey indicating the centerline. Respondent's responsibility to

reflect the work to be performed has been overlooked, even though the Board does seem to acknowledge some semblance of imperfection in the specifications as being "very exacting, yet not precise" and the "perpendicularity requirements as not using the clearest imaginable language". The Board stops short of taking the next step and discounts Respondent's imperfections by finding Petitioner's work improper. Such findings are not supported by the record made primarily by Repsondent's own contemporaneous sources wherein Petitioner's interpretation of the specifications was found reasonable and its failure to make production was, at least in part, attributable to the difference of interpretation between Petitioner and Respondent as to specification requirements.

Some background regarding the period of performance may be helpful to the Court. The contract called for a performance period of 365 days. Notice to Proceed was issued 9/21/83 - thus establishing the required completion date on 9/23/84. It is undisputed that Petitioner did not complete by the required completion date; however, Respondent permitted Shaw to continue work beyond the stated date. No doubt Respondent was mindful that its failure to obtain the necessary Dredging Permit, required by the contract in Paragraph 2A-6, precluded Petitioner from commencing its work prior to the Permit's availability, which was obtained 2/84. Petitioner's equipment began work on 6/26/84, although the preparatory work at the site occurred much earlier, and preparatory work at the stone quarry had also occurred earlier as well.

In 6/84, discussions began between Shaw and Respondent regarding the conditions at the breakwater and the effect upon the work to be performed. These discussions focused upon three major conditions: (1) existence of displaced stone which blocked access to the breakwater (resolved by a VECP under Modification P00001 and the contract price was reduced by $31,500.00); (2) a conflict existed between what he drawings indicated as a centerline and the survey baseline, which resulted in more work on the seaward side than on the harborside (this was to have been resolved by Job Change #2, but the Government terminated before this Job Change #2 was resolved); (3) a conflict developed over the parties' interpretation of the specifications requiring placement of the armor stone to be perpendicular to the slope.

Discussions continued throughout the summer, fall and winter of 1984, as Shaw continued its work in an attempt to satisfy the Government Inspector. Finally, in early 1/85, the meeting of representatives from both parties and Petitioner's bonding company consultants occurred.

On 4/25/86, Petitioner presented its Termination for Convenience Cost Proposal. In that proposal, Petitioner detailed its time and materials proposal for removal of the stone and demobilization. A letter dated 2/19/85, describes a meeting which had occurred on 2/13/85. That letter recites Shaw's understanding that the post-termination work would be done on a time and materials basis.

Petitioner's equipment pricing rationale is also contained in the April Convenience Termination Proposal. Petitioner explained in detail why standby

time should be calculated as it was, why severity factors should be applied, and why the Region I Manual prescribed in Contract Clause SP-33 should be utilized for arriving at equipment rates for ownership and operating expenses. Briefly put, Shaw pointed out that actual costs for each piece of equipment for ownership and operating costs were not ascertainable from its cost records kept as a small business which was not required to comply with Cost Accounting Standards.

The Region I Manual provides that its purpose was for use as guidance in those situations where a contractor's actual ownership and operating costs could not be ascertained for each piece of equipment. In the Preface to the Region I Manual, its use is prescribed for forward pricing and for negotiated procurements. The Board found that it was unclear whether SP-33

should be applied to convenience termination pricing actions. Yet, the Preface itself speaks to its application in "all construction contracts except dredging and all negotiated procurements" which Respondent's CO Rhen considered to be "termination for convenience".

The two-part issue before this Court is whether contract clause SP-33 should be disregarded and whether actual costs represent fair compensation to Petitioner for tying up its equipment from 2/6/85, the date of the first termination through 3/88, the date Respondent's CO made a final decision. Awarding actual ownership and operator costs for non-operating equipment begs the question of fairness by failing to consider Petitioner's inability to put its equipment to work was impeded both by the Petitioner's non-existent bonding capacity and the deteriorated condition of the

equipment resulting from its use in severe terrain. The Board's findings ignore that the idleness of Petitioner's equipment was caused by the suspended state of events originated by Respondent's failure to adequately draft its specifications and to properly describe the location and nature of the work and continued by Respondent's failure to promptly and reasonably compensate Petitioner by payment of such costs necessary to make the contractor whole under the principle of fairness. The protracted process to which Petitioner was subjected, of charging wrong-doing, which charges were dismissed; conducting four time-consuming and expensive audits, whose recommendations were not followed according to the Board; and last, engaging in 20 negotiation sessions, is itself inconsistent with fair treatment under convenience termination guidelines.

The Board was critical of Petitioner's performance of acceptable work effort on ten constructive changes for which Petitioner submitted cost proposals. The Board's examination of these changes served as the basis for its finding that there is no basis to justify an increase to the contract price. The Board heard no testimony from Respondent's CO addressing the issue of why an amount in excess of the adjusted contract price was paid to Petitioner. The Board heard limited testimony from one of the staff for the CO who indicated that the Respondent did so because there was at least on undefinitized change and Respondent was trying to be fair to Petitioner. The Board heard no testimony from Respondent's CO that he considered the Contract to be a loss contract or that he considered application of a loss factor. Finally, the Board heard

no testimony from Respondent's CO that he considered denying profit. Rather the final decision itself and G-70, a cost memorandum prepared to summarize the costs paid to Petitioner, contain a reference to a profit factor of 10%. The Board's de novo power of review must have some reasonable basis in the record before it. The Board professed that it did not intend to second-guess the CO's cost allowances. Yet, its findings do exactly that. The Board's de novo decision appears to be saying three inconsistent things: (1) The Board finds no justification to raise the contract price; (2) Yet, the CO's action of payment in excess of the contract price is acceptable to the Board; and (3) The fact that the CO so acted does not convince the Board that the CO intended to increase the contract price. Such a conclusion defies logic and existing case law as will

be more thoroughly discussed in the Legal Arguments Section.

The instant Petition involves a complex set of circumstances beyond the usual complexity of addressing a termination for the Government's convenience which concedes liability but seeks examination of costs. The Board below overlooked its task of examining the business judgment of the CO to ascertain whether Petitioner had been fairly made whole by the cost adjustments paid and made. The Board found that the CO had been generous or overly generous. The 17-month time lag between 2/6/85, the date of the first termination, and 9/22/86, the date of the first payment made pursuant to partial agreements per negotiation, was not examined. Nor was the Petitioner's financial condition at time of Award evaluated. Petitioner's bonding capacity

and it's business have been destroyed by circumstances surrounding the two convenience terminations. Yet, because such bonding costs were not an actual cost reflected on Petitioner's books, so goes the argument, no compensation could and should have been paid.

Having outlined the relevant facts for the Court's consideration, Petitioner now turns to its Legal Arguments.

LEGAL ARGUMENTS

ARGUMENT 1;

A termination for the Government's convenience converts a fixed price contract to a cost reimbursable contract.

It is axiomatic that, upon termination of a contract for convenience, the terminated portion of a fixed price contract is converted to a cost reimbursable contract. (*R.G. Robbins & Co.*,

Inc., 83-1 BCA ¯16,420 and *Paul E. McCallum, Sr.*, 81-2 BCA ¯15,311).

The Board below concedes as much at page 59 of its Opinion. However, the Board finds that such a statement of cost principle is an oversimplification because of three countervailing cost principles which the Board finds to be inconsistent with treating the fixed price contract as unqualifiably being converted to a cost reimbursable contract.

Since the Board's Opinion attempts to qualify the existing body of case law regarding the conversionary effect of a termination upon a fixed price contract, some background of this previously unchallenged cost principle is in order. As this Court is well aware from opinions in *Maxima Corp. v. U.S.*, 847 F.2d 1549 (Fed. Cir. 1988) and *Torncello v. U.S.*, 681 F.2d 756

(Fed. Circ. 1982) the Government may not use the Termination for Convenience Clause to dishonor, with impunity, its contractual obligations. The Government's power to terminate a contract when its completion is no longer in the Government's best interest developed after the Civil War. In *Corliss Steam Engine Co. v. U.S.*, 916 S. 321, 322, (1871) the U.S. Supreme Court established the legal theory supporting the modern termination clause included in both civilian and military contracts. The progeny of cases following after the *Corliss* decision has established that a termination for convenience, actual or constructive, is not an "open license to dishonor contractual obligations", *Torncello*, 681 F2d at 770, 772. The only real limitation upon the Government's power to terminate for its convenience, places an almost impossible

burden upon the contesting contractor to prove bad faith or clear abuse of discretion. *Kalvar Corp. v. U.S.*, 543 F.2d 1298, 1304-1305 (Ct. Cl. 1976) cert denied 434 U.S. 830 (1977). Thus, care must be taken to reconcile the Government's power with the benefits conferred upon both parties, lest the Government be permitted to avoid the cost effects of a bad bargain while the contractor is permitted to recoup only his actual costs plus a reasonable profit.

The Board maintains at p. 58 of its Opinion, that the overall theory of the termination for convenience clause is "relatively straight forward." The Board speaks in glowing terms of the benefits to the contractor of a termination for convenience, i.e., the contractor is "relieved of some of the work and its cost" and the contractor may have been "rescued from potential loss". The Board never

addresses the parallel benefits conferred on the Government, i.e., the Government has avoided liability for payment on a contract intended to be binding. In order to equalize the position of the parties in the somewhat awkward situation generated by a termination for convenience, DAR S8-301 was passed to enable the CO to recognize the unique circumstances created by such a termination by awarding the contractor costs under the controlling principle of fairness. Besides application of DAR S8-301, the courts have fashioned theories which ameliorate the harsh effects of a termination and increase the contractor's ability to recover costs for attempts to perform under defective or impossible specifications and for constructive changes to the work under the contract.

The Board's finding of "relative straight forwardness" ignores the

complexities involved in the strict application of the cost principles inconsistent with the cost conversion of a fixed price contract into a cost reimbursable contract. The Board's dispute with the practical effect of a termination is not well taken because this approach discounts the validity of other factors found by courts and boards to justify such a characterization of contract conversion.

Significantly, a termination for convenience settlement should compensate Shaw fairly for the work done and the preparation made for the terminated portions of the contract, including costs resulting from a suspension of the work. *M.E. Brown*, 91-1 BCA ¯23,293. Further, the qualifying factors of whether the Government contributed to the increased costs and whether it is possible or not to separate the Government's portion of the

loss from the possible losses caused by the contractor requires that there be no disallowance of profit on a loss contract. *Scope Electronics, Inc.*, 77-1 BCA ¯12,404, Motion for reconsideration denied 77-2 BCA ¯12,586. *R.H.J. Corp.*, 69-1 BCA ¯7587. In effect, the question of whether the completed contract would have resulted in a profit or loss is immaterial. Finally, there is an inherent trade-off employed in a termination setting that disregards any evaluation of work produced as an appropriate standard for determining costs under a termination settlement. Reasonable costs of producing items which failed to meet requirements are recoverable under the Termination for Convenience Clause. *Caskel Forge, Inc.*, 1962 BCA ¯3318, *New York Shipbuilding Co.*, a Division of Merritt Champman & Scott Corp., 73-1 BCA ¯9852. This principle

recognizes that the parties do not need to engage in a fault-finding as to why the continued performance of the contract work is no longer in the Government's best interests.

Thus, juxtaposed against the Board's three qualifying cost principles found to be inconsistent with the conversion of a fixed price contract into a cost reimbursable contract are three competing considerations:

(1) Government suspension of work, actual or constructive, establishes a basis for cost recovery and makes the profit or loss position of the contract immaterial.

(2) Government contribution to increased costs of work, which is not possible to separate from any possible losses caused by a contractor, requires no disallowance of profit on a loss contract.

(3) Evaluation of the contractor's work

product is an inappropriate standard for determining costs under a termination settlement.

Petitioner maintains that the Board below erred, as a matter of law, in ignoring these countervailing cost principles which should have been considered and applied in examination of the convenience termination cost settlement.

Though Petitioner did not couch its Termination Settlement Proposal in terms of a suspension of work theory, the facts in the record clearly establish that there was a constructive suspension of work due to Job Change #2, which was never definitized by Respondent. The Respondent never prepared its independent estimate of the cost effect of Job Change #2 upon the contract cost. In a fixed price contract case where work never even commenced, the

ASBCA found the contractor entitled to recovery of costs for the eight-month delay between the discovery of asbestos and the convenience termination because the delay was so lengthy it was unreasonable to require the contractor to assume the risk of associated costs. Although the contractor never incurred costs during performance, the question of whether the contract would have resulted in a profit or loss was immaterial. *M.E. Brown, supra*.

The Respondent has conceded that Petitioner's interpretation of the specifications would probably be reasonable; however, Respondent insisted that its interpretation be enforced by the Inspector. The Board found that the specifications were "very exacting, yet not precise" and that the perpendicularity requirement did not use the "clearest language imaginable. Under those

circumstances, the Board ignored the Respondent's contribution to Petitioner's cost of the work and improperly found Petitioner to be in a loss position.

Finally, the Board has found Petitioner's pre-termination performance to be unsatisfactory by finding that approximately only 160 ft. was completed per specification requirements. Notwithstanding the fact that the specification requirements were unclear or open for more than one interpretation, the Board's evaluation of Petitioner's work product was improper because that standard has been rejected as inapplicable. The Board finds this unsatisfactory performance to be a yardstick for its finding that no constructive changes occurred. Yet, any conclusion regarding the value of the work product are immaterial, given the circumstances of a convenience termination.

Petitioner was attempting to meet a performance specification impossible to perform, given the language in the specifications. Such work effort, even in a loss position, has been found to be a reasonable basis for recovery of costs. *Scope Electronics, supra.*

ARGUMENT II:
Contract Clause SP.33 is applicable to a termination for convenience pricing action.

The Eng BCA finds that there is a preference for actual costs over estimated costs in a termination settlement. This preference runs parallel to the favored form for a termination proposal being on the inventory versus the total cost approach. Usually, a termination contracting office, ("TCO"), will direct a contractor to prepare his Settlement Proposal on an Inventory Basis. Only in

those cases where the contractor's books and records do not contain a sufficient actual level of cost detail to arrive at an Inventory Proposal should the TCO direct that the settlement proposal be submitted on a total cost basis. There are two points to be gleaned: (1) The TCO, not the contractor, determines the basis for the proposal; (2) sufficient actual cost detail must exist in order for an Inventory Proposal to be feasible. Directing submission of a total cost settlement proposal is inherently contradictory to a finding that actual costs can be identified with a sufficient level of specificity for computing ownership and operating costs for a contractor's equipment.

Because a TCO is charged with the guiding principle of fair compensation, he must consider whether fair compensation demands deviation from the general rule of

favoring actual costs if they are ascertainable. The TCO should be aware that the Contract itself at SP-33 required use of the Region I Manual unless the actual costs of each piece of equipment could be ascertained form the records. This was the contract clause upon which Petitioner's risk assessment was based at time of award. The Board finds that Shaw did not rely upon the word "each" in SP-33 at time of bid: however, no contractor at time of bid contemplates a termination for convenience either. See Appendix Blue for a overview of Sp-33. The Board attributes an unsavory motive to a contractor to avoid application of SP-33 by asserting at p. 64 of its Decision that a contractor could "unilaterally defeat the CO's right to use actual, ascertainable costs" simply by choosing not to separate some equipment costs in its accounts." A contractor could

hardly predict a termination in sufficient time to jockey its books so as not to separate equipment costs in its accounts. The more likely reason, relates to the lack of usefulness to a contractor to do so.

Respondent's TCO directed Shaw to prepare its proposal on a total cost basis. Why? The Board suggests that the TCO did so because there was at least one outstanding undefinitized change, Job Change #2, and the TCO wanted to be fair, which was commendable. The TCO had another option of course, if he truly believed Job Change #2 reduced the amount of work Petitioner would be required to perform, he could and should have issued a deductive change. The TCO elected to pass on performing an estimate to complete a reduced scope of work. The TCO did not pay attention to either the applicable total contract price or what would have been a

reasonable estimate to complete the contract as compared to a reasonable estimate for a deductive change order? If undefinitized changes are not expected to have an extreme impact on contract costs, it is appropriate to definitize the changes, adjust the contract price and apply the loss formula if necessary. By failing to act on Shaw's change proposals, prior to directing the submission of a termination cost proposal, the TCO skewed the basis for determining both the contract price ceiling as well as the potential of any loss. Just as the Respondent's survey for the baseline on the breakwater was inaccurate, the Respondent's delay in evaluation of Petitioner's pricing for constructive changes also created lack of a proper reflection of a cost baseline. Besides this, there is a more fundamental flaw in the Board's ruling.

The Board disputes that SP-33 applies to a termination. The TCO thought that it did since a termination is a negotiated procurement. The Board gives no rationale for its contrary impression and ignores that the Preface to the Region I Manual provides for its use in all construction contracts and all negotiated procurements.

The Board understands the Petitioner's semantic argument but is not persuaded that actual costs were not to be used. Petitioner's argument centers on compliance with the terms of the contract which called for application of the Region I Manual rates unless actual ownership or operating costs for each piece of equipment were ascertainable from the contractor's books. The Board believes that such actual costs were available in the Petitioner's records. In holding that actual costs on a collective basis represent adequate

compensation in a termination setting, the Board has ignored that equipment costs present an extremely unique cost area of a contractor's operations. A contractor's investment in its equipment represents an asset capable of generating revenue.

The Board has failed to recognize and apply the holding in *Tom Shaw, Inc.*, 90-1 BCA ¶22,580, wherein the DOT Board found that a contractor was entitled to compensation for its fully depreciated idle equipment, despite the Defense Contract Audit Agency's policy disallowing any reimbursement for fully depreciated inactive equipment.

In this Decision, the Board has adopted a theoretical approach which ignores the realities under which contractors operate. The DOT BCA points out that depreciation is an accounting device that spreads acquisition costs over the estimated life of an item for

recognizing the cost of equipment as a cost of doing business. The amount of depreciation that may be claimed each year is unrelated to the amount of use or annual revenue generated by the equipment. Under the DCAA approach, a contractor would not be entitled to consider the amortization of the purchase price of equipment if its useful life for accounting purposes had expires, even if the equipment had never been used. The Board found that, although fully depreciated and inactive, the contractor's equipment was capable of performing and generating revenue and thus was still valuable. Ownership of the equipment entailed costs such as maintenance, insurance, and taxes, in addition to the cost of money initially invested. The Board fund that **what especially cost money** during the period of enforced idleness was the contractors'

inability to perform other work with the equipment.

The DOT BCA refused to follow a strict accounting analysis which the Board below has chosen to follow. The DOT BCA stated that adopting the DCAA approach would mean that a contractor would not be entitled to consideration of the amortization of the purchase price if its useful life for accounting purposes has expired, even if that equipment had never been used and therefore provided no recoupment of its purchase price. This is exactly what the Eng BCA has imposed upon Petitioner by virtue of its decision. The inequity placed upon Petitioner is obvious.

As is well stated by the DOT BCA, a contractor does not (normally) purchase equipment merely to generate an annual tax deduction or an accounting write-off. A contractor purchases equipment in the

expectation that within a reasonable time, he will be able to recoup the acquisition cost and realize a profit, a return for the investment. Here, the decision below states that Shaw has been compensated for the equipment costs in that the acquisition costs were reimbursed. This fails to give consideration to Petitioner's purpose underlying the acquisition of equipment.

The Board's decision fails to recognize that it was the Government which chose to terminate the contract for convenience thereby depriving the Petitioner of the opportunity to earn income from its equipment. As is noted above, the contractor can not only reasonably anticipate recouping the value, but also anticipate generating revenue by the use of the equipment. The Eng BCA has deprived the Petitioner of this by adopting the position that the contractor is only

entitled to recoupment of the actual cost of the equipment while failing to address the problem that it was the Government which placed the Petitioner in the position as a result of this protracted termination for convenience. The Eng BCA does not find that Petitioner presented its loss of equipment use on a claim in the nature of additional profit, *Wolfe Construction Co.*, 88-3 BCA ¯22,122; therefore, there should be no need to address this issue on Petition.

The Board dismisses a method for calculating the operating costs for marine equipment, which was developed by the author of the Region I Manual, Mr. Glen Moosman, because the method had no support in the contract and because the Board believes that payment of acquisition cost in the amount of $162,104.00 plus a mark-up for Cost of Facilities Capital (CFC) and

operating costs was sufficient compensation.

The Board contrasts this to its own calculation of depreciation and CFC factors from the Region I Manual. The Board concedes that the Region I Manual does not provide rates for marine equipment but does provide a method to determine ownership costs but not operating costs for marine equipment. Moosman provided a suggested method using comparable operating costs for pieces of heavy land construction equipment similar in size and weight to the marine equipment. Moosman also confirmed that he had been present during some of the negotiation sessions when Petitioner was told to use the Region I Manual. The Board found such use of the Region I Manual was for interim rates only, pending the Audit results of whether actual costs could be determined. That may have been so, but

there is evidence to support the use of the Region I Manual. SP-33 had been accepted by both parties for estimating equipment costs throughout contract performance. Job Change #2 was priced under the Region I Manual. Cost proposals for changed work were submitted under SP-33 using the Region I Manual. The termination proposal was priced according to SP-33 requirements.

The Region I Manual represents average rates based on historical data gathered from a cross-section of the Corps' experience with many contractors. It represents a fair basis upon which to estimate equipment costs - both ownership and operating costs. The underlying reason for development of the Region I Manual was to address the insufficient state of the majority of the contractor's records as being insufficient to identify actual costs for each piece of equipment so that

Government Auditors could obtain complete data on equipment costs.

Because Petitioner's equipment costs are based on average rates as provided for in the Region I Manual, the Board's comments about the unreliable nature of the estimates are not well taken. The only possible factor to evaluate would be the amount of time for which equipment costs are projected. As Shaw has already noted, its inability to put its equipment back to work after the two terminations related to its lack of bonding capacity and its lack of capital resources, both of which arose from the lengthy period of time Respondent took to address the effects of the two terminations. Petitioner did not assume the risk of such delayed relief which came in dribbles over time. Awarding actual costs only for equipment rendered idle by acts of the Government does not bespeak

fairness. *Codex Corporation v. United States*, 226 Ct.Cl. 693 (1981).

CONCLUSION

In this Petition, this Court is faced with three novel interpretations issued by the Engineering Board of Contract Appeals ("Eng BCA", or "Board"). Petitioner maintains that these three interpretations represent such a bizarre twist from the existing case law concerning terminations for convenience that this Court should reverse and remand for proceedings consistent with the principles enunciated by this Court in *Maxima Corp. v. United States*, 847 F.2d1549 (Fed. Cir. 1988) [holding that changed circumstances must exist as a basis for the Government to avoid liability for breaching its contract by declaring a convenience termination],

Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) [holding that the Government bears the burden of proof to establish the amount of a set off for corrective work in a convenience termination setting], and ***Blount Brothers Corp.*** *v. United States,* 872 F.2d 1003 (Fed. Cir. 1989)]holding that the "Substantial Evidence" rule does not require that automatic deference by given to the determination of an administrative Board where there is specific evidence in the record supporting a contrary conclusion].

By its construction of the termination for convenience clause, the Eng BCA has challenged the long-standing holding and well-accepted principle that a termination for convenience converts a fixed price contract into a cost reimbursable contract.

The Eng BCA finds that such a statement constitutes an "over simplification", because there are three countervailing limitations inherent in the termination for convenience clause which support the Board's holding that it would be inconsistent to treat a fixed price contract as being unqualifiably converted to a cost reimbursable contract.

The Eng BCA identified these three limiting factors as follows:

(1) The contract price serves as a ceiling on cost recovery;

(2) A profit allowance is partially or totally eliminated on a loss contract;

(3) Actual costs may be reduced by a loss factor.

These factors have always existed as the courts and boards have examined termination for convenience actions. There has been no emphasis placed on these

limiting factors prior to the instant decision. From the standpoint of the facts actually involved, the Eng BCA may have a point. From the standpoint of the facts actually involved, the Board's notions do not square with the pertinent circumstances. First, the Board's analysis ignores that it was the Contracting Officer's (hereinafter "CO') decision to pay the Petitioner funds in excess of the Contract ceiling price. Second, the Board's holding failed to give any weight to the CO's decision to apply a 10% profit factor on direct costs due Petitioner. Third, the existence of a loss contract was beyond Petitioner's control - thereby making application of any loss factor improper and immaterial. The CO found no reason to apply a loss factor, despite the conduct of approximately 20 negotiation

sessions and extensive audits of Petitioner's termination proposal.

What the Eng BCA's Decision has accomplished is tantamount to a judicial reversal of the CO's decision to terminate for convenience instead of default. The de novo review power of a Board does not enable it to disregard a CO's decisions favorable to a contractor. *Melvin Wilner v. United States*, Slip Opinion No. 92-5161, decided May 24, 1993, Fed. Circuit.

Petitioner contends that the Eng BCA committed a material error of law by failing to consider at least four competing factors consistent with the principle that a convenience termination converts a fixed price contract into a cost reimbursable contract:

(1) The convenience termination makes it impossible for a contractor to correct any allegedly defective work;

(2) Evaluation of a contractor's work is not an appropriate standard for determining costs under a termination settlement, including actuals, costs, profit, and whether a loss factor should be applied;

(3) Government contribution to increased costs of work, which are incapable of separation from any possible losses, caused by the contractor, require no disallowance of profit on a loss contract;

(4) Defective specifications and Government suspensions of work, actual or constructive, make the profit or loss position of the contract immaterial.

Petitioner has demonstrated that the Respondent should not benefit from chaotic circumstances under which the Petitioner was directed to submit its termination pricing. The Eng BCA applied abstract principles in total disregard of the

factual actions taken by the Respondent's CO.

The Eng BCA did not give due weight to the evidence justifying why the initial termination was for convenience and not default. Instead, the Eng BCA has circumvented the effect of a convenience termination by finding a loss contract without giving consideration to the Government's contemporaneous documents substantiating that the specifications was reasonable, and that the Government's position for rejecting the contractor's work was doubtful.

Finally, the Eng BCA has misapplied the burden of proof. It is well-accepted that the Government bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for default. Likewise, in a convenience termination situation, it is the

Government's burden of proof to establish a loss contract and the amount of the loss. The Board clearly concedes that the Government did not meet its burden to prove the amount of loss but the Board totally disregarded that the Government never prepared an estimate to complete the contract. In the case of *Lisbon Contractors v. United States, supra*, the Government,

in a default termination action, did not perform an estimate of time to complete, which invalidated the default termination. It is undisputed that the Government, in this case, never prepared an estimate to complete the work. Therefore, the Board's sole basis on which to find a loss contract emanates from either Petitioner's completion estimate or the fact that only 20% of the work had been completed prior to termination. The Respondent submitted no evidence regarding cost estimates for

completion and yet the CO paid costs in excess of the ceiling price. Petitioner is being asked to both prove its costs and to prove why it was reasonable for the CO to pay funds in excess of the Contract's ceiling price. This is inconsistent with the burden of proof, where the Petitioner's proof is used to penalize it by the finding of a loss contract.

Shaw believes this Petition for a Writ of Certiorari serves as an opportunity for this Court to reconcile the content of the termination clause with the intent of the governing regulations so that a contractor terminated for convenience may not be put through the costly and time-consuming task of justifying the validity of both its own costs and the propriety of the Government's actions. This constitutes an unfair and onerous burden to bear under the practically unfettered right of the

Government to declare a termination of the contract for its convenience.

Respectfully submitted,

/S/

Thomas R. Hungerford
3857 S. Straits Hwy.
P.O. Box 849
Indian River, MI 49749
(616)238-4333

Supreme Court, U.S.
F I L E D

95-184 FEB 13 1995

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

TOM SHAW, INC.,

Petitioner,

v.

TOGO WEST,
SECRETARY OF THE ARMY

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Federal Circuit

APPENDIX TO THE WRIT OF CERTIORARI

THOMAS R. HUNGERFORD (P40000)
Attorney for Petitioner
3857 S. Straits Hwy.
P.O. Box 849
Indian River, MI 49749
(616)238-4333

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VOL. 1

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable adprecadent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-1384

TOM SHAW, INC.,
Appellant,

v.

John Shannon,
ACTING SECRETARY OF THE ARMY,

Appellee.

Judgment

ON APPEAL from the BOARD OF CONTRACT APPEALS
ARMY CORPS OF ENGINEERS
in CASE NO(S). 5540,5541,5620-5628 and 5675

This CLAUSE having been heard and considered it is

ORDERED and ADJUDGED:

Per Curiam: (MAYER, MICHEL and SCHALL, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: NOV 14, 1994

Francis X. Gindhart, Clerk

Before the Corps of Engineers Board of Contract Appeals

Appeals of	)	
		ENG BCA Nos.
TOM SHAW, INC.	)	5540, 5541, 5620-5628 and 5675
Contract No. DACW33-83-C-0070	)	

APPEARANCES FOR APPELLANT:

Judith Ward Mattox, Esq.
Mattox & Associates, P.C.
Colorado Springs, Colorado

APPEARANCES FOR RESPONDENT:

Frank Carr, Esq.
Chief Trial Attorney

John I. McGuire, Esq.
Jon Abramczyk, Esq.
Government Trial Attorneys
Washington, D.C.

Joseph DiGiovanni, Esq.
Government Trial Attorney
Waltham, Massachusetts

OPINION BY ADMINISTRATIVE JUDGE SHERIDAN

The Appellant seeks about $10.3 million, plus interest, in addition to approximately $3.2 million already paid by the Government, on a contract to repair a breakwater, terminated for the convenience of the Government well before completion, where the original contract price for time entire job was about $2.3 million and the current contract price is nearly the same. The Government opposes any further payment and seeks the return of about $2.6 million of the $3.2 million already paid. The usual determination construction contract

involves the total costs of the work, whether or not affected by unresolved changes or differing site conditions, plus a fair and reasonable profit. However, the total amount to be paid under the contract, exclusive of settlement expenses and Contract Disputes Act interest, is limited by the contract price. In order to exceed that limit, the contractor must establish a basis for raising the contract price. These appeals include the issue of raising the contract price.

FINDING OF FACT1

1. Pursuant to formally-advertised competitive bidding, the United States of America (the Government, Corps, or Respondent), acting through a Contracting Officer for the U.S. Army Engineer Division, New England, Waltham, Massachusetts, awarded Contract No. DACW33-83-C-0070 on August 31, 1983, to Tom Shaw, Inc., a Michigan corporation (Shaw, TSI, or the Appellant). The contract provided for repairs to a breakwater. This was a fixed-price type construction contract using a unit-price format and a combination of lump-sum and estimated-quantity pay items. The initial estimated contract price was $2,306,249.40. The current estimated contract price, as changed by a bilateral modification, is $2,274,749.40. (R.4, Tabs 5, 12, 36).

2. The contract specifications contain many standard General Provisions (GP), including GP-3, "Changes (1968 Feb), " GP-4, "Differing Site Conditions (1968 Feb), " GP-6, "Disputes (f1983 Feb), "GP-9, "Material and Workmanship (1964 Jun), "GP-

12, "Permits and Responsibilities (1964 Jun), " GP-18, "Termination for Convenience of the Government - Construction (1974 Apr), " and GP-45, "Site Investigation (1965 Jan)." The specifications also contain Special Provisions (SP) and Technical Provisions (TP). (R. 4, Tab 5).

3. The contract required repair and rebuilding of parts of the main breakwater at the Point Judith Harbor of Refuge, point Judith, Rhode Island. Point Judith is on the Atlantic Ocean and Block Island Sound, just west of the entrance to Narragansett Bay. The main breakwater is about 5,700 feet long, and is not attached to land at either end. It lies between the west shore arm breakwater and the east shore arm breakwater, each of which is attached to land at one end. Locations on the main breakwater are described in terms of 100-foot stationing starting at Station 0-00 at the west end light. The contract work was divided into three areas. The center are, from about Sta. 20+34 to about Sta. 43-00, was designated a major repair area, "requiring the removal and/or resetting of existing armor stone, the placement of a new cover layer of 12- to 15-ton stone and the placement of core stone" The areas at both ends, from the west end light (Sta.0+00) to about Sta. 20+34, and from about Sta. 20+34 to about Sta. 43+00, were

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1Citations to the record, where given, are generally only for illustration, and are not necessarily exhaustive. The Findings of Fact and Decision are based on the record as a whole.

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designated minor repair areas. In minor repair areas, the repairs "consist of the placement of 2 to 5 ton stone and 12 to 15 ton stone" and "generally requires the placement of small quantities of stone at isolated damaged areas and minor resetting of adjacent and underlying stone." (R.4, Tabs 5, 6).

4. Notes on the contract drawings state that, in all repair areas, stone is required on "both sides" and on the "top" or "crest" of the breakwater. The drawings also show nine complete voids where, as of 13 April, 1983, no part of the breakwater remained in tact above the mean low water level. Three of those complete voids were in a minor repair area but were specifically designated in the contract to be repaired. The other six voids were in the major repair area. (R.4, Tabs 5, 6).

5. There are three cross sections depicted on the contract drawings. Each of the three cross sections is designated a "Typical Section" and shows the design of the rebuilt or repaired breakwater for a portion of its length. The design includes the width of the crest and its height above mean low water, the angles of the side slopes, and the locations of the centerlines of each of the three portions in relation to a survey baseline provided by the Government. The survey baseline is depicted on plan views on the drawings as running through the approximate center of the existing breakwater. The first "Typical Section" covers about 2,000 feet starting at the west end; the second (middle) section covers about 1,100 feet; and the third section covers about 3,600

feet, ending at the east end. Each "Typical Section" includes an irregular dashed line with the notation "Exist. breakwater (other repair areas vary from that shown(." The west section shows the dashed line running through the crest and the harbor side slope; the middle section shows the dashed line running through the crest and the dashed line running through the crest and the harbor side slope. The west section depicts the centerline of that portion of the existing breakwater as the same as the repaired breakwater. The middle section depicts the centerline of that portion of the centerline of the rebuilt breakwater (indicating that the rebuilt breakwater was to offset about ten feet toward the harbor side centerline of that portion of the existing breakwater as about two and one-half feet to the seaward side of the centerline of the rebuilt/repaired breakwater (indicating an offset of the new work plan view shows that the offset work applied only to the major repair area, which ended at Sta. 43+00±. From that station to the east end, there was no difference between the old and new centerline. (R. 4, Tabs 5, 6; TR-B, 254-260, 778-780, 789-791).

6. The contract described two sources of the stone to be used for repairs. One source was stone that had been displaced from or within the existing breakwater. The other source was new quarried bedrock. (TP 2A-1 provides in part: "The work includes rehandling and resetting existing stone and furnishing and placing new quarried stone.") There were two weight ranges for the quarried stone: armor stone was to weigh from 12 to 15 tons per piece,

and stone for the core was to weigh from 2 to 5 tons per piece. Reused armor stone was also required to weigh between 12 and 15 tons per requirement. (R. 4, Tabs 5, 6).

7. The specifications requirements for setting stone in the breakwater were very exacting, yet not precise. Stone setting in breakwaters, and especially in repairing an existing breakwater, is a skilled occupation that several witnesses stated approaches an art. The principal challenge is to evaluate the holes to be filled, to visualize the best stones from the sizes and shapes available in the stockpile, and to manipulate the stones so that they achieve optimum interlocking with underlying or adjacent stones. Often, the underlying or adjacent stones must be adjusted as part of the process. Some excerpts from the specifications illustrating the difficult process are:

> (a) No stone shall be used in which the least principal dimension is less than one third of the greatest dimension. Slabs, boulders and round stones will be rejected. The stone shall, in general, be of irregular and angular shape; however, not more than 25% may be roughly rectangular, provided such stone is placed with its long axis perpendicular to the side slopes. (TP 2A-3.1)
>
> (b) Prior to the placement of any material, the Contractor shall establish construction control markers clearly visible and understandable to the workmen placing the material. (TP

2A-4.1.1)

(c) In areas designated by the Contracting Officer for placement of armor stone, existing adjacent and underlying stone shall be removed as necessary to incorporate this new work and shall be reset as part of the work to insure interlocking of all stone. (TP 2A-4.1.2)

(d) Each [12- to 15-ton] stone either in the minor repair area or major repair area shall be placed individually by equipment suitable for lifting, manipulating, and placing stone of the size specified. Each stone shall be selected with care as to size and shape, and placed to obtain firm contact with the maximum number of adjacent stones in order to obtain the best possible interlocking. the stone shall be laid with its longest dimension perpendicular to the length of the structure. The cover stone is to be left rough with placing efforts concentrated on insuring that each stone is firmly set and well supported by underlying and adjacent stones. Obtaining a smooth face is neither necessary nor desirable, and will not be permitted. The surface of the armor slope stone shall be constructed within a tolerance of plus 18 inches or minus 12 inches from the slope lines delineated on the drawings. Neither extreme of these tolerances shall be continuous with placement of adjacent stones to ensure that the average tolerance is no more than 6 inches from the design line. Stones

placed beyond the specified limits, as herein extended, will not be paid for and may be required to be removed. Rectangular stone will be placed with it's [sic] long axis perpendicular to the side slope. (TP 2 A-4.4)

(R.4, Tabs 5, 5A, 5B, 5C, G-1; TR-B, 710-712, 783-784, 1716-1717, 1739-1740).

8. The contract itemized payments as follows:

Item No.	Description	Est. Quantity
1.	Furnishing & Placing 12-15 Ton Quarried Stone-Main Breakwater	
	a. First 46,000 tons	46,000
	b. Over 46,000 tons	12,000
2.	Furnishing and Placing 2-5 Ton Quarried Stone-Main Breakwater	
	a. First 600 tons	
	b. Over 600 tons	
3.	Rebuild core with existing available small and medium size stone from Station 2034± to Station 43+00±	
4.	Salvaging and Resetting existing 12 to 15 ton stone within the design section	

Unit	Unit Price	Estimated Amount
a.Tons	$34.44	$1,584,240.00
b.Tons	$26.17	314,040.00
a.600 Tons	$30.45	18,270.00
b.150 Tons	30.45	4,567.50
3.1 Job	L.S.	253,402.05
4.1 Job	L.S.	131,729.85
	Estimated Total	$2,306,249.40

(R. 4, Tab 5).

9. The contract resulted from an Invitation for Bids issued June 24, 1983. Bids were opened on August 2, 1983. Shaw's bid price of $2,306,249.40 was the lowest of the 11 bids submitted, which ranged up to $4,417,550.00. The Government estimate amounted to $2,678,750.00. (R. 4, Tabs 1, 5; Exh. R-13).

10. Shaw2 provided a written confirmation of its bid on August 9, 1983. A pre-award meeting was held on August 15, 1983. A Government memorandum dated August 16, 1983 reports on that meeting as follows:

> 1. A pre award meeting with the apparent low bidder (Tom Shaw, Inc.) for work under the subject Inv. No. was held in NED on 15 August 1983. In attendance were:
>
> Mr. Tom Shaw - Tom Shaw, Inc.
> Mr. Dale Douglas - Bonding Company
> Mr. Fred Moehle - Chief Construction Divison

Mr. Frank Vilkas - Area Engineer, Rivers & Harbors Area

2. Mr. Shaw named *** quarries that he was investigating ie [sic] Tiverton, Rhode Island, Bates, and Stonington. Mr. Shaw was told that

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2 In this opinion, "Shaw" refers to the contractor corporation and "Mr. Shaw" to its president.

Tiverton and Bates, from historical data, could have a problem producing acceptable size stones. Mr. Shaw thought this was critical in that his bid review indicated that the only problem could be the price of acceptable stone. A tentative visit to Bates Quarry was scheduled for 16 August 1983.

3. Mr. Shaw said he basically planned to do the work with a 100 ton crane on a 60' x 160' barge. He was presently negotiating purchasing the barge. Also to be used was a 1066 backhoe rigged with a grapple. The problem of working from the outside of the breakwater with regard to weather conditions and crane reach was discussed. Mr. Shaw said that if conditions warranted he would dredge some of the shoaling from the inside for access and if necessary put a crane on the breakwater. Mr. Shaw appeared somewhat optimistic about working from the outside with regard

to weather conditions, as during his two site visits conditions were favorable.

4. Mr. Shaw proposed that he might attempt completing the lump sum items while quarrying and preparing to haul new stone. The problem with possible damage to core stone that was reset without the protective armor stone was discussed. Mr. Shaw was told that it was his responsibility Clause would not apply should he fail to do so or if damage was caused by less than "hurricane" conditions.

5. Qualifications of stone setters were discussed and Mr. Shaw said that he had qualified, experienced personnel in his employ. He said he understood the requirements for interlocking and tolerances and used the work in progress on the east shore arm breakwater as an example.

6. Mr. Shaw reiterated that he wanted to do the work and that he was presently only concerned about proper pricing of acceptable stone.

(R. 4, Tabs 3, 4, G-5).

11. As noted above, the contract was awarded on August 31, 1983. The record does not disclose the date on which Shaw furnished the required Miller Act performance and payment bonds Notice to proceed with the work was issued September 21, 1983 and was acknowledged by Shaw on September 29, 1983, establishing the required completion date as September 23,

1984. (R. 4, Tabs 1, 5, 8).

12. Shaw had never built a breakwater before being awarded this contract. Shaw had never repaired an ocean breakwater (and there is no actual evidence that it had repaired any breakwater anywhere). Shaw had done some previous stone placement work but required at Point Judith. Its previous experience was limited to handling a maximum size of about 8-ton stone. In dollar amount, this was the largest contract involving marine work that Shaw had ever undertaken. (TR-C1, 150-153).

13. On February 1, 1984, Shaw executed a written "Purchase Order" agreement with Tri-County Sand & Gravel, Inc. of Hope, Rhode Island, to supply the quarried stone needed for the project at the price of $5.00 a ton, delivered to a loading site accessible to Shaw's barges. On March 13, 1984, Tri-County began transporting stone to the Rhode Island Port Authority's Davisville dock, where it was stored until Shaw was ready to transport it by barge to the breakwater site. On May 23, 1984, Shaw and Tri-County agreed to raise the price on the balance of the stone to be supplied by Tri-County to $14 a ton. (R-4, Tabs 10, 42G, G-8, G-13, G72; TR-B, 634-638).

14. The bulk of Shaw's equipment arrived in Rhode Island by barge on or about May 26, 1984. Shaw began stone placement on the breakwater on or about June 26, 1984. This initial placement was not accepted by the corps because it did not meet the specification requirements for interlocking. (R. 4, Tabs 1, 5, 6, G-15,

G-72; TR-B, 634-638).

15. On June 5, 1984, Mr. Shaw discussed with Mr. Frank Vilkas, Area Engineer for the Corps with responsibility for this contract (and an authorized representative of the Contracting Officer), the possibility of a Value Engineering Change Proposal (VECP) to section of the reconstructed breakwater, and to incorporate that stone into the contract work in the same manner as applied to Item 4 of the Schedule of Payments, covering such salvageable stone within the design section. On June 6, he telexed such a VECP to Mr. Vilkas. (R. 4, Tab G-13).

16. On June 11, Mr. Shaw telexed a claim notice regarding an alleged delay in his starting work between Sta. 43+00 and Sta. 23+00 which he said was due to conflict between the specifications and notes and cross-sections on the drawings. The basis of the claim is not clear, but the gist of his telex seems to be that there were large masses of displaced stone adjacent to the breakwater which he had expected the Government to require him to use in the repair work but for which he had expected to receive extra payment, since that stone was not covered by a specific payment item. The telex indicated that the Government now intended not to require him to use that stone, and not to pay him for moving it, leaving him with stone that he would have to move anyway because it blocked his access to the breakwater. He indicated that he wanted additional payment and additional time for he dredging and removal of this stone. This was the same stone that was the basis for his VECP, and

if it was already required to be used, its use would not constitute a VECP, since it would not be a "change". Also, Sp-23 of the specifications provided that costs for required work for which there was not a specific payment item had to be included in the prices bid for the payment items that were listed. The Government did not consider that use of this tone was already required, and was willing to accept the VECP. After a meeting with Mr. Vilkas on June 14, 1984, Mr. Shaw sent a telar withdrawing the June 11 claim notice. (R. 4, Tabs 5, 6, G-14, G-**).

17. On July 6, 1984, Modification No. P00001 was issued pursuant to GP-56, Value Engineering Incentive - Construction (1980 Dec), to reflect the VECP by Shaw to salvage existing 12-15 ton stone. The modification also permitted Shaw to salvage smaller stone for Shaw's own use. The estimated amount of new 12-15 ton contract price was reduced by $31,500. Two new items were added to the Schedule of payments, as follows:

Item No.	Description	Estimated Quantity
5.	Salvaging 12-15 ton stone outside the design section	*5,000
6.	Salvaged stone as a result of VECP No.1	*5,000

* Upon completion of the contract these estimated quantities will adjusted based on the actual quantity of new and salvaged stone placed to reflect actual quantities.

Unit	Unit Price	Estimated Amount
tons	$23.44	$102,200
tons	$ 7.70	$ 38,500

Mr. Shaw signed the modification about August 14, 1984, and returned it to Mr. Vilkas with a letter dated August 21, 1984, requesting time extensions of four weeks for delay associated with negotiation of the VECP and of 30 days (pro-rated if necessary) for every 5000 tons of stone salvaged in accordance with the modification. A total of 3,601 tons of stone was salvaged and used before the termination under the terms of this modification. (R. 4, Tabs 12, 36, G-16, G-17; Exh. R-72).

18. The Government had an inspector, Mr. Ronald Dubreuil, observing the work on a daily basis. In addition, other Government personnel observed the work from time to time. On July 31, 1984, Mr. Vilkas, the Area Engineer, and Mr. Fran Donovan, also of the Corps, visited the breakwater site and observed the stone placement from about Sta. 40+00 to about Sta. 42+00. The work was generally of poor quality, with lack of interlocking, flat slopes, and long stones not perpendicular to the length of the breakwater. Mr. Shaw complained that there was not enough depth to place the 12- to 15-ton armor stones perpendicular to the length of the breakwater. Mr. Vilkas reminded Mr. Shaw that the specifications required that each stone be selected with the particular void in mind, and that adjacent and underlying stone might have to be moved to obtain

proper fit and interlocking. It was further noted that there were no construction control markers (which the parties refer to as templates) to show workmen the required slopes and limits of the work. The next day, Mr. Shaw telephone Mr. Vilkas to say that a template had been set up and there was still too little room to place the armor stone without removing three feet of core stone. Mr. Shaw said that this condition was typical but the Government inspector at the site, Mr. Dubreuil, reported to Mr. Vilkas that at that time, it involved placing a single stone. (R. 4, Tabs G-18, G-19, G72; TR-B, 698-710).

19. On August 3, 1984, Mr. Vilkas again visited the breakwater site. Mr. Vilkas moved the template that had been erected at or near Station 42+00 about 2-1/2 feet towards the seaward side of the breakwater so that it approximated the location of the existing breakwater. This was a move of the centerline of the planned new configuration of the breakwater so that it was approximately on the survey baseline, rather than offset 2-1/2 feet to the harbor side. This move responded to the complaint by Mr. Shaw that the voids in the seaward side slope were too small for the 12- to 15-ton armor stone and thus required too much movement of existing armor and core stone to make room for the new armor stone. Mr. Vilkas also made the move to obtain a full 20-foot width of the crest without interfering with the slope on the harbor side, which was found to be generally intact at that point after overlying displaced stone had been removed. Before the move, the configuration of the

rebuilt breakwater at that location would have been offset about 2-1/2 feet to the harbor side of the configuration of the existing breakwater, requiring the building of a whole new slope on the harbor side. After the move, 2-1/2 feet of planned new work was eliminated from the harbor side. Before the move, Shaw had to fill holes on the seaward side of the breakwater. After the move, Shaw still had to fill the same holes on the seaward side with the same weight-range of stone, but the work was easier because more space was available and less adjustment of existing armor stone and core stone was necessary to accommodate the new stone. Mr. Vilkas later designated this moving of the template as Job Change No. 2. The intended scope of Job Change No. 2 is vague. If the movement of the centerline to approximate the survey baseline had been continued into the reach of the breakwater between about Sta. 20+34 and Sta. 31+37 in the major repair area, where the configuration of the rebuilt breakwater was designed to be offset about ten feet toward the harbor side of the configuration of the existing breakwater, there might have been a significant shift of stone placement work from the harbor side to the seaward side. However, no work was ever attempted in that area. As it was, Job Change No. 2 reduced work effort by eliminating about 2-1/2 feet of new work on the harbor side and making the work on the seaward side easier, but it had little actual effect on Shaw's costs up to the time of termination, reducing them if anything. ($. 4, Tabs 6, G-18, G-20, G-21, G-22, G-26; Exhs. R -1, R-2; TR-B, 479-431, 702-708, 812-830, 842, 860, 867-874).

20. On August 6, 1984, Mr. Shaw telexed Mr. Vilkas asserting that "substantial changed conditions" had been encountered in two respects during the installation of 12- to 15-ton armor stone. The conditions were described in the telex as follows:

> "Design Section" 1. The drawings and specs are designed with the intent to use points up 7/8 ft amour stone installation for repair work when in fact the original breakwall is constructed of a combination of various different size amour stone with an average depth of only four to five ft. The problem encountered is to install the pts up amour stone within the design section as detailed, will require substantial removal of the brkwall's core matls approx a minimum of 2 ft to approx of 7 ft. to create voids large enough to receive the new 12/15 amour stone. We consider this additional mass removal and related other work as may be required to be on and above the original contract and request additional compensation and a time extension for the work in question.
> "Cross Section" 2. It has also become apparent after clean-up operations have been completed, the drawings and typical cross sections which indicate the mass of the amour stone repair work to be done on the harbor side are not correct. The actual site conditions, after clean-up confirm that mass of the work is to be done on the sea-ward side of the breakwall instead.

The telex also stated:

> As a result of this changed condition, we are encountering additional cost for double handling of matls, excessive weather delays, additional labor and equipment costs in placing of the amour stone.
>
> We request this additional work as outlined above as to be extra and request additional compensation and a time extension as may be agreed upon. We confirm our interest to be present at the meeting scheduled for this coming 8-8-84 and request that the above noted issues be addressed in detail at that time.

(R. 4, Tabs 20, 43A).

21. On August 8, 1984, Mr. Shaw met at the breakwater site with Mr. Richard Carlson, Assistant Chief of the Construction Division and also an authorized representative of the Contracting Officer, Mr. Vilkas, and Mr. William Triantafell, all of the New England Division of the Corps. Mr. Shaw acknowledged that, as a result of Mr. Vilkas shifting the template on August 3, 1984, and with more careful selection of stones to fill particular holes, difficulty in stone placement within design contours and extensive rehandling of core stone could be minimized. However, he reiterated

his contention that the quantity of seaward side stone repair was greater than indicated on the drawings. All three Corps representatives reviewed Shaw's stone setting efforts to date and agreed with each other and with the Government inspector that all stone placement was unacceptable, mostly because of poor interlocking. Mr. Shaw told the Corps representatives that he had arranged for experienced stone setters to start work the next week. In this regard, GP-9 provides, in part: "All work under this contract shall be performed in a skillful and workmanlike manner." (R. 4, Tabs G-7, G-20, G-21; TR-B, 709-711, 824-830).

22. On August 14, 1984, Mr. Shaw telexed Mr. Vilkas, withdrawing the "^Design Section" claim item of the August 6 telex,

> assuming the following conditions as discussed with F Vilkas and myself are understood:
>
> 1. That the design section be allowed to be opened as necessary to install the 12/15 ton stone as required by the job. 2. That a reasonable tolerance be allowed at the toe and closing pt at the cap stone. 3. Also, that a time extension be considered as a result of the time lost due to this clarification of plans.
>
> However, the telex also stated:
>
> Regarding Item "2" "Cross Section", it is still our position that the plans are cross sections as detailed do not

reflect the actual working conditions we are presently working under. Basically that ... the majority of the work is on the sea-ward side, not harbor side as detailed.

(R. 4, Tab G-22; TR-B, 824-830).

23. Shaw's "Cross Section" claim was based on a pre-bid interpretation alleged to have been made by Mr. Shaw of information depicted on the three "typical" cross sections shown on the contract drawings. This claim is discussed below in connection with ENG BCA No. 5620.

24. On August 16, 1984, Mr. Walt Burdick, a thoroughly experienced stonesetter, started to work for Shaw. Mr. Burdick worked for Shaw as a "subcontractor" at a flat hourly rate, operating Shaw's equipment and working with crew members, recommended by him, who were on Shaw's payroll. Payments for Mr. Burdick's work were made to Mr. Burdick's corporation. Between August 16 and 23, Mr. Burdick repaired Shaw's crane and prepared for stone setting. He found the crane in very poor condition, and, even after repairs, it was not fully suitable for stone setting work. Mr. Shaw testified that it was Mr. Burdick who was responsible for the damage to the crane, but we believe Mr. Burdick's version of events. (R. 4, Tabs G-22, G-72; TR-B, 647-651, 1711-1741; TR-C1, 90-94).

25. On August 20, 1984, Mr. Shaw telexed Mr. Vilkas, in reference to his earlier telexes and to the discussion at the job site on August 8, with an estimate

of "additional cost of ... added work resulting from changed conditions." The estimate totaled $1,191,190.99. The telex also stated: "Presently addtl equipment and manpower required to address the changed conditions are being mobilized. Rock placement reflecting these chdg conditions will begin shortly." (R. 4, Tabs 15, G-23; TR-B, 830-831).

26. On August 23, 1984, Mr. Vilkas wrote to Shaw as follows:

> Reference your telex messages of 6, 14, and 20 August 1984, regarding your contention that the plans and cross sections do not correctly reflect the amount of work to be performed on the seaward side of the breakwater.
>
> The plan view indicates approximate conditions along the more than 6700 feet of breakwater to be repaired. It indicates major blow outs and indicates that repairs are required on "both sides" and top of the structure for its entire length. Additionally the plans and specifications indicate that in the major repair area the breakwater is to be "re-built".
>
> The three "typical sections" shown are obviously not intended to depict that the state of disrepair is constant over the entire length and they are each qualified by the statement that "other repair areas vary from that shown". It is noted that page 4 of the Supplemental Invitation for Bids alerted contractors that a pre-bid site visit was arranged and that

aerial photographs of the structure were available for review during the bidding period. Considering this and the fact that you acknowledged the site investigation requirements of General Provisions para. 45 "Site Investigation" it should have been clear during the bidding period that the cross sections were not meant to indicate the overall state of disrepair. Only a cursory site investigation would have revealed this, and the fact that extensive repairs were required on the seaward side.

During our pre-award meeting on 15 August 1983, with Mr. Dale Douglas of your bonding company and Mr. Fred Moehle (then Chief Construction Divison) present, you indicated that you had made two site visits and were planning to do most of the work from the outside. This is considered indicative of the fact that you were then aware of the work required on the seaward side.

Considering the facts presented, your contention that additional work over the above that included in your bid unit prices is considered to have no merit. [sic]

(R. 4, Tab G-24; Exh. R-1; TR-B, 831-836).

27. On August 24, 1984, Mr. Burdick began setting stone between Sta. 39+80 and Sta. 41+25. Between August 24 and September 10, Mr. Burdick set stone acceptably to the Government and completed

rebuilding the breakwater between those stations The stones were interlocked as required by the specifications. On September 10, Mr. Burdick began resetting stones between Sta. 39+50 and Sta. 39+80. However, at the end of the day, Mr. Shaw terminated the services of Mr. Burdick and the crew that was working with him. The reason he gave to Corps representatives and to Mr. Burdick at the time was that he now had a better understanding of how stone had to be placed and could set the stone with his own crew. At the hearing, he attributed Mr. Burdick's layoff more to dissatisfaction with Mr. Burdick's use of equipment and rate of production. (R. 4, Tab G-72; TR-B, 635-636, 647-651, 712-713, 1711-1741; TR-C1, 90-94).

28. On September 11, 1984, Shaw resumed stone setting with the crew it had used before Mr. Burdick's work. The quality of the stone setting immediately deteriorated and became unacceptable, as before. Between September 11 and October 11, Shaw worked between Sta. 39+80 and Sta. 37+00. All stone placement in this area was unacceptable for lack of adequate interlocking, except a 15-foot section between Sta. 38+60 and Sta. 38+75. (R. 4, Tabs G-25, G-72; Exh. R-1; TR-B, 646-656, 710-713).

29. On October 5, 1984, Mr. Carlson and Mr. Vilkas again visited the worksite and met with Mr. Shaw, and with the assigned Government inspector, Mr. Dubreuil. Their observations are reflected in a letter dated October 11, 1984, from Mr. Vilkas to Mr. Shaw, quoted in part as follows:

> Our observations were that only a portion of the work done to date is in accordance with the contract requirements. These areas were pointed out to you in the field and include station 41+25 to 39+80 and 38+60 to 38+75. In these areas we found the stone to be appropriately sized and well interlocked.
>
> All of the other areas we inspected have not been constructed in an acceptable manner particularly with respect to interlock. In many cases, armor stones placed in the slope have been placed so the stones placed on top of them cannot be interlocked. [Emphasis in original] This apparently results from the improper selection of stone shapes and sizes as the slope is being constructed.
>
> As directed on October [5], 1984, you are to take whatever steps are necessary to construct the work in accordance with the contract requirements, especially interlock with adjacent stones and the proper selection of stones to attain a finished slope conforming as closely as possible to the required section. These directions apply throughout the project, including the areas previously constructed and all subsequent work.

(R. 4, Tabs 44A, G-25, G-72; TR-B, 861-864).

30. On October 22, 1984, Mr. Vilkas again visited the worksite, as reflected in

his letter dated October 25, 1984, to Shaw. The letter states, in part:

> I again visited the site on October 22, 1984, to inspect new work performed between October 6 and October 12, 1984 (Sta. 38+00 to 37+00) and found this work to also be unacceptable for the following reasons:
>
> a) Undersized stones and slabs incorporated into the work.
>
> b) Lack of interlock, particularly at intersection of cap and slope.
>
> c) Slope stones extending outside the required section (tolerance considered)
>
> d) Large voids, particularly at toe of slope.
>
> Also noted during the inspection was that at least two undersized slope stones (6.8 T and 7.5 T at Sta. 39+50 and 38+25 respectively) were dislodged, apparently by weather conditions of last week. These conditions are not considered severe with respect to the integrity of the structure and the stones were dislodged easily due to improper size and interlock.

It is realized that correction of deficient work has been delayed by weather conditions but the quality of new work, as noted above, raises grave concern over your ability to prosecute the work acceptably. Additionally noted is your unresponsiveness

to directives to provide a boat for the Government inspector [as required by TP 2A-4.1.3].

(R. 4, Tabs 45B, G-27, G-72; TR-B, 864-865).

31. On October 24, 1984, Mr. Shaw raised a question of the interpretation of TP 2A-4.4 as it reflected on the rejected workmanship. On October 31, 1984, Mr. Shaw met with Mr. Carlson and Mr. Vilkas to discuss the Government's intention to give his firm an interim unsatisfactory performance rating. At that time, he asked for a written interpretation of TP 2A-4.4. (R. 4, Tabs 45C, G-29, G-30; TR-B, 874-879).

32. On November 2, 1984, Mr. Carlson wrote to Mr. Shaw as follows:

> Inclosed please find a sketch indicating stones "laid perpendicular to the length of the structure" as stated in specification Para. 2A-4.4. This sketch is provided as you requested during our meeting of 31 October 1984. The stones have been drawn for illustrative purposes only as they are depicting a 3-dimensional object in 2 dimensions.
>
> Referencing your letter of 24 October 1984, regarding the same subject and not received until after our meeting, I must disagree with your position on this subject. Although as you state "a number of positions may be used to meet the specs.", a <u>horizontal</u> position which creates a flat surface

> is generally unacceptable as it is not conducive to obtaining proper interlock. [Emphasis in original]
>
> It is noted that you have been under contract for over a year and have been on the job setting stone for four months. Up until now you have not questioned the intent of the specifications with regard to proper stone position and it appears you are making an attempt to interpret the specifications such that you can justify not correcting rejected workmanship.
>
> A conflict in the specifications, as you claim, is not seen to exist and your request for a "change order" is unwarranted.
>
> In furtherance of the subject of qualifications and experience of personnel setting stone it is requested that you provide the name and location of projects that they have set stone in order that previous workmanship may be reviewed.

(R. 4, Tabs 45C, G-29; TR-B, 874-879).

33. On December 3, 1984, the quarry operation at Tri-County supporting this contract was shut down for the winter (and, as it turned out, never resumed). Shortly thereafter, Shaw shut down operations on the breakwater for the winter. During all stone setting operations to that time, no Shaw worker except Mr. Burdick had demonstrated skill as a stone setter,

despite Mr. Shaw's statement at the pre-award meeting that Shaw had qualified, experienced stone setters in its employ. Some of the Shaw workers who attempted to set stone had no relevant experience at all. (R. 4, Tabs 47A, G-35, G-36, G-40, G-41, G-72; TR-B, 647-652, 657-658, 711-717, 893).

34. On January 9, 1985, at Shaw's request, the Contracting Officer met with Mr. Shaw, and with some consultants retained by Shaw at the suggestion of Shaw's surety. The consultants made a presentation in support of Shaw's assertion that differing site conditions and constructive changes were the causes of the slow performance of work. They suggested either the immediate funding of Shaw's continued performance by issuance of twp-part change orders or a termination for convenience of the Government. The Government attendees listened to the presentation but did not enter into discussions of it at the meeting. After the meeting, the Contracting Officer instructed his staff to develop cost ranges for three modes of termination: termination for default; termination for convenience; or a negotiated agreement to terminate. (R. 4, Tab G-31; TR-B, 43, 51-56, 63, 66-70, 73-75, 952-954).

35. On February 6, 1985, the Contracting Officer terminated Shaw's right to proceed for the convenience of the Government, pursuant to General Provision (GP) 18 of the contract. Shaw was directed to do some post-termination work, such as stockpiling stone not yet placed on the breakwater and transporting to the

breakwater site any undelivered stone that Tri-County Sand & Gravel, Inc. (Tri-County), its stone supplier, had already produced for the project. (R. 4, Tabs 1, 21).

36. During the course of the entire contract period before termination, Shaw worked placing stone only 71 days. In the two minor repair areas, Shaw worked 12 days in the west area (11 of them on the harbor side only) and one day in the east area. The work in the west area took place along about 650 feet of the 2,034-foot length of that section of the breakwater. The one day of work in the east area took place at Sta 58+35 on the harbor side of that 2,425-foot section of the breakwater. None of the work in either area was acceptable. The major repair area was on a section of the breakwater about 2,266 feet long. Shaw placed stone on only about 460 feet of that section, none of it in the portion where the breakwater would have required the most new work, a ten-foot offset toward the harbor side from the existing configuration. Of the 460 feet placed, a total of only 160 feet was acceptable. (R. 4, Tab G-72; Exh. R-1; TR-B, 628-695).

37. On February 25, 1985, Shaw telexed the Government that it intended to do the post-termination work on a time and material basis, citing hourly rates for labor and equipment. The telex also stated that Tri-County would incur "substantial costs" to mobilize and perform its part of the post-termination work. (R. 4, Tab G-42).

38. On March 5, 1985, the Government amended the termination notice to eliminate any post-termination work by Tri-County with respect to stone not already delivered to Shaw at the Davisville dock loading site. On March 6, 1985, the Government referred Shaw to the provisions of the Defense Acquisition Regulation (DAR) with respect to "Settlement of Subcontract Claims." At the same time, it rejected the time and materials basis proposed by Shaw for the post-termination work. (R. 4, Tabs 22, 25 (18M), G-45, G-47).

39. Meanwhile, the Department of Labor (DOL) was continuing an investigation, begun in January, of suspected violations by Shaw of labor provisions of the contract, for which the Contracting Officer had been asked to (and did) withhold about $140,000 from earnings. Also, the Army Criminal Investigation Division (CID) was investigating Shaw for suspected fraud in billing the Government for interim payments. (R. 4, Tabs G-45, G-48, G-49, G-51, G-52, T-53; TR-B, 717-718).

40. On May 10, 1985, the Contracting Officer terminated for default Shaw's right to proceed with any remaining post-termination work. The acts or omissions listed by the Contracting Officer as leading to the termination for default were:

> (a) You have submitted invoices reflecting increases in the price of quarry stone which are inaccurate, misleading and unsupported.
>
> (b) You have charged the Government

for construction equipment which is in fact inoperable.

(c) You have billed the Government for marine equipment while such equipment was being utilized on a private contract.

(d) You have failed to prosecute the close out work in a timely and diligent manner.

(R. 4, Tabs 1, 23).

41. On November 13, 1985, Shaw brought an action in the United States Claims Court,3 seeking conversion of the termination for default of the post-termination work to a termination for the convenience of the Government, and seeking "at least $221,954.48, the exact amount to be proven at trial, " for breach of contract or quantum meruit as to the post-termination work. The complaint also included a demand for Contract Disputes Act interest on all amounts found due on the basis that, on September 27, 1985, Shaw had "submitted to the Contracting Officer a certified cliam for $221,954.48 based on the allegations in this Complaint." As of November 13, 1985, the September 27 cliam was not ripe for appeal or court action because the Contracting Officer had not denied it and had not had 60 days to decide it, or within which to notify Shaw of how much additional time he would need to decide it. In fact, the claim was later appealed to this Board and has been docketed as ENG BCA No. 5628. (Complaint in ENG BCA 5541; Board's File in ENG BCA 5628).

3Now the United States Court of Federal Claims. See Title IX of the Federal Courts Administration Act of 1992, Public Law 102-572, 106 Stat. 4506, approved October 29, 1992.

42. On December 19, 1985, the CID issued its final report and closed its file. This action came after the CID had presented its evidence to an Assistant United States Attorney, who had declined criminal prosecution. On January 23, 1986, the DOL, after deciding in Shaw's favor on the principal questions of labor violations, reduced its withholding request to about $33,000. (R. 4, Tabs 57, G-68).

43. On April 14, 1986, the Contracting Officer received Shaw's certified termination settlement claim in the amount of $9,175,285.28 for itself and $2,131,896.88 for its suppliers. The decision" and "interest at the maximum rate pursuant to the contract Disputes Act." (R. 4, Tab 25).

44. In the Claims Court proceedings, the Department of Justice and Shaw jointly sought and obtained a series of orders suspending proceedings between August 7, 1986, and April 27, 1988, to permit negotiations looking towards a settlement of the termination for convenience claim, and, if the parties were not successful in reaching a settlement, a Contracting Officer's Decision. The termination for convenience claim was not itself before the Curt. In the Court proceedings, the Department of Justice and Shaw filed a

number of joint status reports with specific undertakings of the parties, which they asked the Court to adopt in its own orders, and which the Court did adopt. In addition, on September 9, 1987, Shaw moved for sanctions and contempt against the Corps and the Contracting Officer for alleged failure to comply with an April 27, 1987 order which had adopted a schedule "[p]ursuant to agreement of the parties." Shaw's motion requested an order "[t]hat the Corps and its Contracting Officer, Col. Thomas A. Rhen, be held in as this Court deems proper until such time as they shall fully comply with all of the terms of this Order." By order filed sanctions and contempt." The motion for sanctions and contempt was pursuant to its authority under Section 10(d) of the Contract Disputes Act, as amended, 41 U.S. Code 609, and remained pendings until denied on May 23, 1989. (Board's File, ENG BCA 5541).

45. On August 28, 1986, the Contracting Officer formally converted the termination for default of the post-termination work to a termination for the convenience of the Government. (R. 4, Tabs 24, 60).

46. On or shortly after the dates shown below, the Government made partial payments to Shaw as follows:

ESTIMATE NUMBER	DATE	PAYMENT AMOUNT	CUMULATIVE PAYMENTS
1	2/21/84	$23,287.00	$ 23,287.00
2	4/18/84	19,572.00	42,859.00
3	5/25/84	10,458.00	53,317.00
4	6/27/84	109,263.00	162,580.00

5	8/02/84	74,173.00	236,753.00
6	9/10/84	27,567.88	264,320.88
7	11/02/84	49,933.44	314,254.32
8	12/10/85	34,160.41	348,414.73
9	1/16/86	6,963.00	355,377.73
10	1/27/86	140,101.30	495,479.03
11*	9/22/86	321,929.97	817,409.00
12*	10/14/86	394,000.00	1,211,409.00
13*	11/25/86	163,352.80	1,374.761.80
14*	12/16/86	25,940.47	1,400,702.27
15*	6/10/87	550,000.00	1,950,702.27
16*	2/16/88	627,744.41	2,578,446.68
17*	2/26/88	29,841.97	2,608,288.65
18	3/21/88	32,591.00	2,640,879.65
19	3/25/88	241,458.20	2,882,337.85
20	5/03/88	142,975.22	3,025,313.07
21	8/31/89	154,570.57	3,179,883.65

*These payments were based on invoices from Shaw pursuant to partial agreements reached during termination settlement negotiations.

(R. 4, Tabs 36, B-3; TR-B, 1397-1440, 1662-1711).

47. The parties engaged in extensive negotiations, involving about 20 face-to-face sessions, in an attempt to reach a settlement. Along the way, they reached subsidiary agreements on many cost items, as reflected in partial payments 11 through 17, totaling $2,112,809.62. However, they were unable to agree on a final termination settlement, and the Contracting Officer resorted to a settlement by determination, reflected in a final decision issued March 1, 1988, as supplemented on April 27, 1988. Shaw appealed to this Board on Ma 23, 1988. The appeal was docketed as ENG BCA No. 5540. As previously indicated, on May 25,

1988, the United States Claims Court, at the request of the parties, transferred the earlier Claims Court action to this Board, where it was docketed as ENG BCA No. 5541. These appeals were consolidated for hearing and decision. (R. 4, Tabs 1, 2, 36, G-70; TR-B, 1397-1440, 1662-1711; Board files).

48. The Board held a 3-day hearing in Cheboygan, Michigan in March 1990 and a 10-day hearing in Boston, Massachusetts in April and May 1990. Extensive briefing followed. The appeals became ready for decision with the filing of Shaw's Reply Brief on January 17, 1991.

Contract Price as Ceiling on Payments

49. During the course of these appeals, the Board ruled that the Contracting Officer had already made payments in excess of the existing contract price, and that, in order to support any claimed further recovery in excess of that contract price (except for settlement expenses and contract disputes act interest), Shaw would have to establish some basis for raising that price, such as establishing the existence and extent of changes or differing site conditions. Since Shaw had filed a number of certified claims that, for negotiations, the parties had created as incorporated in the main termination claim, Shaw, at the Board's suggestion, and to remove any doubt about the Board's jurisdiction otherwise to deal with contract price increases, then filed appeals from the Contracting Officer's failure to have decided those claims specifically. Those appeals are listed below. They were consolidated with ENG BCA

Nos. 5540 and 5541 for hearing, though they retain their separate identities for discussion and decision.

50. The termination of the contract for convenience limits the significance of the Board's findings as to the acceptability of the work actually performed by Shaw. Although the Board has found that the Government was correct to the extent that it rejected armor stone placement for failure to achieve adequate interlocking and for other breaches of the specifications. Shaw nevertheless became entitled to payment for that work by virtue of the termination and the consequent requirement that Shaw be paid the total of its allowable costs under the contract, plus a fair and reasonable profit and settlement costs. The requirement for payment of actual costs and profit is subject, however, to the contract price as a ceiling, and subject also to the possible loss of profit and application of a loss adjustment if the Government can prove that a loss would have been incurred if the contract had continued to completion. Since Shaw has already been paid more than the contract price, the Board's findings relate to the possibility of a loss contract and to Shaw's assertions that there were changes and/or differing site conditions that warrant an increase in the contract price to permit higher payments than already made. (R. 4, Tab 5; TR-B, 254-261, 628-695, 695-748, 753-772, 797-956, 962-997).

51. As noted above, Shaw appealed several separate claims, at the suggestion of the Board, to remove any doubt that the

Board could resolve the whole matter in one decision. Shaw no longer seeks the amounts of those claims as additions to the amounts it seeks in ENG BCA No. 5540.1 The sole purpose of those appeals now is to serve as possible vehicles for raising the contract price to allow a recovery in ENG BCA 5540 that may be in excess of the existing contract price. The additional appeals that have been consolidated with ENG BCA No. 5540 for decision are:

Docket Number	Date of claim	Date of appeal	Original amt./claimed
5620	10/31/84	05/17/89	$1,939,014.00
5621	11/04/84	05/17/89	727,049.00
5622	11/04/84	05/17/89	Included
5623	11/18/84	05/17/89	1,373,583.00
5624	02/28/85	05/17/89	11,327.00
5625	03/05/85	05/17/89	407,214.00
5626	07/19/85	05/17/89	767,990.22
5627	07/11/85	05/17/89	1,943,111.85
5628	09/26/85	05/17/89	221,954.48
5675	11/05/84	08/31/89	381,947.00

Description

Job Ch.2 Sta. 31+37 to 43+00
Changes - Sta. 31+37 to 43+00
Now included in ENG BCA No. 5621
Changes - Sta. 13+50 to 20+34
Removing spud
Changes - Sta. 43+00 to 67+25
"Time & Material" 2/6/85-5/13/85
Demobe and 6/24/85 to 12/14/85
"Time & Material" 5/14/85-6/23/85
Changes - Sta. 0+00 to 13+50

52. Shaw has modified the amounts and descriptions of some of the separate claims

included in these appeals. The final amounts are as follows:

Docket Number	Original Amount Claimed	Final Amount Claimed
5620	$1,939,014.00	$1,000,531.00
5621	727,049.00	375,157.00
5622	Included in	ENG BCA 5621
5623	1,373,583.00	200,816.00
5624	11,327.00	No Change
5625	407,214.00	19,311.00
5626	767,990.22	No Change
5627	1,943,111.85	No Change
5628	221,954.48	No Change
5675	381,947.00	99,023.00

1Shaw's Replay Brief changed the claimed additional amount (before interest) from $12,2 million to 10.3 million. The principal change was to drop an item for $2.1 million for constructive changes, on "reflection and review" that revealed an overlap with another item.

Docket No. ENG BCA 5620

53. This appeal involves the significance of Job Change No. 2. Shaw asserts that Job Change No. 2 was a recognition of Shaw's position that there was far more work to be done on the seaward side of the breakwater than was indicated by the contract drawings. As the Board has found above, Job Change No. 2 was itself a change that potentially could have shifted work from the harbor side to the seaward

side, but it did not do so significantly before the work was terminated, and, in any event, was in no way a recognition of Shaw's position as to what was indicated by the drawings. However, this appeal still serves as a vehicle for exploring merits of Shaw's assertions about the indications of the drawings.

54. Mr. Shaw testified that he bid with the expectation that 90 to 95 percent of the stone placement would be done from the barges located on the harbor side of the breakwater. He said that he based this expectation on his reading of the three "typical" cross sections on the drawings. (See Finding No. 5) In his view, these three cross sections were intended to depict existing conditions along the whole breakwater. He denied that the "typical" sections were intended to show the design of the rebuilt and repaired breakwater. He gave no satisfactory explanation of how the design of the contract work on which he bid was established in the contract, if not by the "typical" sections. He insisted that the irregular dashed lines on the three "typical" sections could reasonably be read to indicate that the entire breakwater had ne of the three configurations, or only a slight variation from one of them. As to the note pointing to the dashed line on each cross section ["Exist. breakwater (other repair areas vary from that shown")], he asserted that it was merely a cross-reference to the other "typical" sections and did not indicate any variability of the existing conditions from the depicted profile within the range of the breakwater covered by the particular cross section. (R. 4, Tabs 5, 6; TR-C1,

168-175, 184-186).

55. Mr. Shaw testified that his bid was based on placing stone by the use of cranes mounted on barges, that he expected to use two such crane barges, and that each would place 500 tons of stone a day, for a total production of 1000 tons a day. Mr. Shaw based all of his estimates of alleged additional costs on the difference of his estimates of alleged additional costs on the difference between an expected placement of 1000 tons a day and the much lower production he was achieving on the actual work. There was no crane barges, and certainly it did not with the painstaking care necessary for breakwater repairs. Mr. Robert Moniz, a construction contractor and project manager with nearly 30 years of experience with marine construction, and Mr. Burdick were the most qualified witnesses who testified the hearing about breakwater construction and repair. We found them entirely credible and helpful. They testified that it was not feasible to use a crane mounted n a barge to repair a breakwater. The main problem would be the operator's limited visibility of the holes to be filled. Other problems would be the limiting effect of weather on the days a barge-mounted crane could work at all, and the limited reach of the cranes. No reasonable production could be expected. The only feasible method is to mount the crane on the breakwater itself, where the operator would have better visibility and weather would much less frequently interfere with the stability of the crane and ability to perform stone placement work. Even on that basis, one crane would be expected to set

only about 100 tons a day. (TR-B, 522-531, 772-795, 1711-1741; TR-C1, 104).

56. GP-45 provides, in part: "The Contractor ... acknowledges that he has satisfied himself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from information presented by the drawings and specifications made a part of this contract." A contemporaneous (pre-award) Government memorandum of a meeting with Mr. Shaw refers to two pre-award site visits by Mr. Shaw, not indicating whether either was also "pre-bid," the significant time for reliance on "contract indications." Mr. Shaw's testimony at the hearing about a pre-bid site inspection is not consistent with that memorandum, or even consistent within itself. Most of the testimony was in terms of the "pre-award" period, rather than the more specific "pre-bid" period, but, in contest, Mr. Shaw was claiming only one site inspection, and that was not only "pre-award" but "pre-bid". (A Government witness testified that Mr. Shaw told him, after award, that Mr. Shaw had not gone out and looked at the breakwater; however, the context of that conversation is not clear and we do not rely on it.) (R. 4, Tabs 4, G-5, G-24; TR-B, 443-448, 537, 631-632; TR-C1, 47, 155-160, 168-175, 184-187).

57. Mr. Shaw's testimony described his claimed site inspection in varying terms, especially with regard to his

viewing of the seaward side of the structure. His final version was 100 feet (though the stations mentioned would approximate 200 feet). He testified that he was not interested in and did not draw any conclusions about the conditions on the seaward side. He considered them not to be significant to him anyway because he had already decided from the drawings that only five to ten percent of the work was on the seaward side. (R. 4, Tabs 4, G-5, G-24; TR-B, 443-448, 479-481, 537, 552-555, 696; TR-C1, 47, 155-160, 168-175, 184-187).

58. Mr. Moniz and Mr. Burdick testified convincingly of the need for a site inspection before bidding on breakwater repairs; their testimony is at odds with Mr. Shaw's testimony that he was not concerned with the seaward side when he made his alleged site inspection because of what he says he learned from the "typical" sections on the drawings. A reasonable pre-bid inspection of the seaward side of the breakwater would have disclosed that there were significant displacements of stone and many voids on the seaward side. A reasonable reading of the contract drawings would have led the seaward side of the breakwater. Putting it another way, Shaw has not persuaded us that there was any core work to be done on the seaward side than should have been expected from a reasonable readings of the contract documents and a reasonable site inspection. (R. 4, Tab G-24; TR-B, 772-795, 831-834, 1711-1741).

59. Regrettably, we must state an unfavorable observation for the sake of the record. Mr. Shaw has been of little help

to us in determining the facts of this case. We are unable to take his testimony at face value. We found him relentlessly self-serving, often inaccurate as to matters that were clear in the record, evasive and unduly uncooperative on cross-examination, and simply not credible as to important aspects of his alleged pre-bid assumptions and interpretations and as to many of his other assertions during the course of the hearing.

60. In attempting to prove the increase in contract price it claims for the alleged changes and differing site conditions, Shaw has used estimates of the cost effect of the alleged compensable events on the entire job if it had continued to completion, and then has attempted to estimate the percentage of completion of the alleged extra work. It is entirely appropriate to use estimates in an increase in contract price, we have no confidence in the particular estimates used here. To many unreasonable or subject to our overall observation that it lacks credibility. The most questionable assumption was that stone would have been properly set at the rate of 1,000 tons a day if it had not been for the alleged differing site conditions. Since we are not persuaded that Shaw encountered differing site conditions or other compensable events in connection with ENG BCA No. 5620, we do not go into detail about the inadequacy of the quantum evidence. (R. 4, Tabs 17, 40(12), B-4; TR-B, 511-537, 543-544; TR-C1, 114).

Docket Nos. ENG BCA 5621 and 5622

61. These two appeals have been combined, and deal with the alleged effect between Stations 31+37 and 43+00 of what Shaw claims was a misinterpretation by the Government of the requirement of TP 2A-4.4 for the longest dimension of armor stone to be perpendicular to the length of the structure, and to a lesser and, in fact, unascertainable degree, the effect of roughly rectangular stones being required also to be perpendicular to the side slope they were in. Mr. Shaw alleges that there was a problem of stone placement being affected or rejected as a result of a dispute over perpendicularity requirements. However, his contemporaneous did not arise until the end of October, 1984, not long before stone placement ceased. There is no persuasive evidence that, after Mr. Shaw raised the issue, Shaw changed its method of placing stone to comply with an interpretation by the Government that differed from its own, or that stone placement was ever rejected as a result of a disagreement over perpendicularity requirements. (R. 4, Tabs 19, 20, 40(13), 43A, 44A, 45C, 45D, 49, B-4, G25, G-29, G30, G-72; Exh. A-17; TR-B, 492-504, 511-537, 613-627, 698-704, 861-864, 874-879; TR-C1, 102-103, 111).

62. Mr. Shaw used the term "points up" to refer to placing armor stone so that one end of its longest dimension pointed up out of the breakwater. Before he raised any question about the perpendicularity requirements of TP 2A-4.4, Mr. Shaw had based his "Design Section" claim, later withdrawn, on the assertion that "[5}he drawings and specs are designed with the intent to use points up 7/8 ft amour [sic]

stone installation for repair work ...." [Emphasis added.] On October 24, 1984, when Mr. Shaw first asked the Government for an interpretation of the perpendicularity requirements, he stated that "a number of positions may be used to meet the specs." On November 2, Mr. Carlson agreed. However, Mr. Carlson also stated that a horizontal position that created a flat surface was generally unacceptable as not conducive to obtaining proper interlocking. At the hearing, Mr. Shaw testified that he had based Shaw's bid on the assumption that stone could be stacked up horizontally, on top of another, and still meet the requirements of the contract as long as the stone was "perpendicular to the length of the structure" and tightly stacked. This testimony conflicted with his earlier "points up" position reflected in the "Design Section" claim, and ignored the most significant requirement of all, interlocking. (R. 4, Tabs 19, 20, 40(13), 43A, 44A, 45C, 45D, 49, B-4, G-25, G-29, G-30, G-72; Exh. A-27; TR-B, 492-504, 511-537, 613-627, 698-704, 861-864, 874-879; TR-Ca, 102-103, 111).

63. Mr. Shaw acknowledged that roughly rectangular shapes of stone had to be placed "in a different manner," with their long axes perpendicular to both the length of the structure and the side slopes. When he first made an issue of the perpendicularity requirements on October 24, 1984, he had argued that those two requirements were in compatible. They were not incompatable; however, they were not strictly enforced and did not present a real problem during performance. At the

hearing, Mr. Shaw minimized the significance of the roughly rectangular stones. He testified that they were "not much of a concern" and "didn't really come up very often." He also testified that he never understood what the Government's position as to "perpendicular to the length of the structure" really was, so it is unclear in what respect he felt the Government was applying a mistaken interpretation, especially since his own position was not clear or consistent. (R. 4, Tabs 19, 20, 40(13), 43A, 44A, 45C, 45D, 49, B-4, G-25, G-29, G-30, G-72; Exh. A-17; TR-B, 492-504, 511-537, 613-627, 698-704, 861-864, 874-879; TR-C1, 102-103, 111).

64. In the course of justifying a termination for convenience, Mr. Vilkas prepared a draft Determination and Findings (D&F) for the Contracting Officer. A copy of the Vilkas D&F was obtained by Shaw during discovery and entered in evidence. It is not clear that the draft D&F in evidence was executed in that form, but the Government has not disavowed it. In the D&F, Mr. Vilkas states that a case for termination for default could be made but that it would be contested by Shaw or Shaw's surety "on the basis of ambiguous specifications and changes being the cause of problems." Mr. Vilkas goes on the say: "Although not in agreement that the low production is due solely to changes or ambiguities, the government's position is prejudiced by the fact that they do exist." Accordingly, Mr. Vilkas recommended a termination for convenience of the Government. Earlier in the D&F, Mr. Vilkas described the alleged ambiguity as th requirement of TP 2A-4.4 to the length of

the structure." Mr. Carlson also seemed willing to concede that that phrase, but not the overall requirement of the specification, was ambiguous. However, Mr. Carlson seemed to equate ambiguity with difficulty of interpretation. Neither party has made clear to us that there was an actual conflict in the parties' interpretations, at least in connection with actual placement of armor stone. (R. 4, Tab 49; TR-B, 570-627, 628-695, 797-95, 962-997).

65. The perpendicularity requirements of the specifications do not use the clearest imaginable language. However, the mere discussion of the perpendicularity "issue" tends to overstate its significance. The armor stone was irregular and angular, and had no real "axis" to be "perpendicular" to the length of the breakwater. The requirement was only an approximation, and was not applied strictly. The armor stone was generally to have its longest dimension, to the extent one could be ascertained, resist the force of the waves. No "geometry test" was being administered. (R. 4, Tab 5; TR-B, 570-627, 628-695, 797-956, 962-997).

66. Shaw seeks to raise the contract price by $375,157.00 through these two appeals. In attempting to prove the increase in contract price in claims, Shaw has again used estimates of the cost effect of the alleged compensable events on the entire job if it had continued to completion, and then has attempted to estimate the percentage of completion of the alleged extra work. Again, and for the same reasons as above, we have no

confidence in the particular estimates used here. (R. 4, Tabs 19, 20, 40(13), 43A, 44A, 45C, 45D, 49, B-4, G-25, G-29, G-30, G-72; Exh. A-17; TR-B, 492-504, 511-537, 613-627, 861-864, 874-879; TR-C1, 102-103, 111).

Docket Nos. ENG BCA 5623, 5625, and 5675

67. On October 9, 1984, Mr. Vilkas agreed with Mr. Shaw that some holes in the minor repair area at the west end of the breakwater could be repaired satisfactorily with th smaller and less expensive 2- to 5-ton stone rather than with the specified 12- to 15-ton stone. Accordingly, he reduced the estimated quantity of 2- to 5-ton stone by the same amount. Mr. Vilkas acknowledged that this was a change, but it wa clearly a change that reduced the cost of the work. The smaller stone was much easier to handle and set, and, to the minor extent that any of this work was performed, Shaw used salvaged stone rather than quarried armor stone, itself a significant saving in cost. (R. 4, Tabs 16, 20, 40(5), 40(10), 40(15), B-4; TR-B, 865-867; TR-C1, 113-114, 178-182).

68. Shaw seeks to raise the contract price by a total of $319,150.00 through these three appeals, partly by unfocused arguments that the change in quantities constituted an acknowledgement that some of the work in the west minor repair area should have been designated major repair work. In attempting to prove this increase in contract price, Shaw has again used estimates of the cost effect of the alleged compensable events on the entire job if it had continued to completion, and then has

the entire job if it had continued to completion, and then has attempted to estimate the percentage of completion of the alleged extra work. As with other appeals above, and for the same reasons, we have no confidence in the particular estimates used here. In any event, we are not persuaded that Shaw encountered differing site conditions, constructive changes, or other compensable events in addition to the simple change in quantities involved in these appeals, or that the change in quantities increased the cost of the work. (R. 4, Tabs 16, 20, 40(5), 40(10), 40(15, B-4: Exh. A-17; TR-B, 511-537, 365-867; TR-C1, 113-114, 178-182(.

Docket No. ENG BCA 5624

69. Shaw seeks to have the contract price raised by $11,347.28, its estimate of the cost of retrieving a steel spud that turned out not to be one of its own lost spuds. Special Provision (SP) No. 9 of the contract required Shaw to retrieve any material, plant, machinery, or appliance that it lost overboard "which in the opinion of the Contracting Officer may be dangerous to or obstruct navigation." During the course of the work, Shaw lost some steel spuds, which had broken off a barge in heavy swells. Spuds are long pipes or beams designed to stick into and stand upright from the sea bottom to hold a vessel in position. When broken off, they are particularly hazardous to navigation and could easily punch a hole in a vessel that floated over or into them. While seeking its own broken spuds, Shaw raised on that turned out not to be its own. Shaw retained possession of that spud. The

Contracting Officer did not order Shaw to search for or remove other people's spuds. This retrieval was incidental to Shaw's routine compliance with the contract terms. It was not ordered by the Government and did not reflect a change in the contract, nor has Shaw shown it to be the result of a differing site condition. (R. 4, Tabs 5, G-72; TR-B, 634-637).

Docket Nos. ENG BCA 5626 and 5628

70. These two appeals cover what Shaw describes as "time and material charges" for post-termination movement of stone from the Davisville dock to the breakwater site. This is basic contract work, included in the contract price, that was continued after the work was ended on May 10, 1985, when the termination for default notice was issued. Shaw seeks to raise the contract price by a total of $989,944.70 for this work. Whatever actual costs were incurred are included in the total costs which are the subject of the overall termination settlement. Shaw alleges that this work was performed by agreement on a "time and material" basis. However, there was never an agreement that this work was somehow extra work to be paid for under a separate contractual arrangement. The work itself was a small part of the regular work already required under the contract (transportation of stone to the breakwater site). There was an attempt to agree on labor and equipment rates for this work, solely for the purpose of interim payments, but there was never an agreement that this work was somehow to be excluded from the total cost basis for a termination settlement. Even the interim use of such

rates was quickly rejected by the Contracting Officer. (R. 4, Tabs 21, 23, 40(18), 50, B-4, G-47; TR-B, 944-945).

71. The claimed amounts run from February 6 to June 23, 1985. Since work was completely terminated on May 10, 1985, Shaw's basis for considering any work thereafter as being done under an agreement for "time and material" work is not clear. In any event, the claimed amounts have never been satisfactorily proved even in terms of Shaw's alleged "time and material" basis. (R. 4, Tabs 1, 21, 23, 40(18), 3-4).

Docket No. ENG BCA 5627

72. Shaw seeks to raise the contract price by $1,943,111.85 for estimated demobilization costs. Mr. Shaw testified that Shaw's bid included only $117,500 for both mobilization and elements of eh cost of a construction contract and are incurred whether the contract is terminated before completion or continues to completion. For example, in this contract, TP-2A-5.2.1, Payment, provides that payment for new stone at the contract unit price for items 1 and 2 "shall be full compensation for furnishing and placing all materials and performing all work as specified herein, including... mobilization, demobilization and clean-up." There is no doubt that Shaw is entitled to include its demobilization costs in its total costs. However, demobilization does not provide a basis for raising the contract price. Demobilization is distinguishable from post-termination work, which may either be part of the basic contract work or be incidental t the facts.

It is also distinguishable from post-termination standby. Demobilization, as described by Mr. Shaw, was physically demobilization costs run through October 31, 1988. There is no credible evidence that Shaw's demobilization costs were increased as a result of the termination for convenience. (R. 4, Tabs 25(9); TR-B, 1181, 1187, 1223-1224, 1274).

Summary of Separately Docketed Appeals

73. We find that Shaw has not established a factual basis in any of the separate appeals, ENG BCA Nos. 5541, 5620-5628, and 5675, that would warrant an increase by the Board in the existing contract price.

74. The major category of costs in dispute involves construction equipment, mostly classified as marine equipment. Shaw's initial termination settlement proposal sought $5,534,658 for ownership and operation of equipment, including $3,554,582 for marine equipment. Of the marine equipment, Shaw sought $3,028,472 for three principal items: the tug ROBERT CHARLES and Barges 34 and 35. Shaw purchased these three items in the fall of 1983, after award of the contract, for use under the contract. They were purchased as a package, without separate prices, for a total of abut $162,184, including capitalized transportation and repair costs. The Contracting Officer allowed payment of the total cost to Shaw of these three items of equipment, plus nearly $200,000 for costs of modifications to them for this job, plus an allowance for Shaw's investment in them (known as Cost of

Facilities Capital or CFC). In addition, the Contracting Officer allowed payment of actual operating costs included in Shaw's books for these items and all others used on the job. Except or these three items, purchased for a lump sum price, and a 300-amp welder for which no purchase record existed (a similar one cost $1,100), the auditors were able to ascertain the acquisition cost and depreciated book value of each separate item of equipment. Actual operating costs (which consist of: fuel; filters, oil and grease; servicing the equipment; repair and maintenance; and tire wear and tire repair(were also ascertainable from Shaw's books, though they were not broken out by item of equipment. (Labor to operate equipment is not considered part of "operating costs" as that term is used in connection with this contract.) (R. 4, Tabs 1, 2, 25, 28, G-70; TR-B, 1397-1440, 1444, 1512, 1518-1578, 1578-1657, 1662-1711; TR-C1, 119).

75. The contract contains a Special Provision (SP) which reads as follows:

> SP-33. EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE. (1981 JUNE OCE)
>
> a. Whenever actual ownership and operating costs for each piece of equipment or equipment groups of similar serial [sic] and series cannot be determined by the Contracting Officer from a contractor's accounting records, allowable costs for construction equipment in sound workable condition owned or controlled and furnished by the contractor or

subcontractor at any tier for work requiring adjustments in contract price shall be determined in accordance with applicable provisions of the "Contstruction Equipment Ownership and Operating Expense Schedule," Region I, For forward pricing, the Schedule in effect at the time of negotiations shall apply. For retrospective pricing, the Schedule in effect as of the time the work was performed shall apply. For the purpose of determination of the hourly rates to be applied under this contract, working conditions shall be considered to be average unless otherwise determined by the Contracting Officer. Rates for equipment not in the schedule will be computed by the Government using the formulas in the schedule. Where applicable, rates in the schedule may be used for unlisted equipment of comparable horsepower and auxiliary features.

b. Equipment rental costs are allowable, subject to the provisions of DAR 15-205.34 and 15-402.2, substantiated by certified reproduced copies of invoices or bills. Rates for equipment rented from an organization under common control, lease-purchase or sale-leaseback arrangements will be determined in accordance with the schedule. A copy of the schedule will be provided to the successful bidder upon request.

c. In determining the ownership expense for marine equipment as

described in the Scheduled, the average use per year shall be 6 months.

(R. 4, Tab 5).

76. The edition of the Region I Schedule applicable t nearly the whole period of actual performance states: "The rates included in this pamphlet are based on construction equipment purchased new on 1 July 1982." The use of the Schedule is described therein as follows:

> 1-5. Use. This pamphlet shall be used as the basis for estimating equipment costs on those contracts which require an independent Government estimate. These include all construction contracts (except dredging) and all negotiated procurements. This pamphlet shall also be used in pricing of contract modifications when:
>
> * * *
>
> b. Cost or pricing data is required and actual cost data to support either ownership or operating costs for each piece of equipment or equipment groups of similar serial and series is not available.
>
> * * *
>
> 2-2.a. General. The total hourly rates include all costs of owning and operating equipment except operating labor and overhead expenses. The ownership portion of the rate consists of allowances for depreciation and cost of facilities

capital. Operating costs include allowances for: fuel; filters, oil and grease; servicing the equipment; repair and maintenance; and tire wear and tire repair.....

* * *

2-2.e. Standby. The standby rate is computed from the average condition rates by allowing the full "CFC" hourly cost plus one-fourth of the hourly depreciation. No more than 8 hours of standby will be paid during a 24-hour day, nor more than 40 hours per week. Standby time will not be allowed unless the equipment has bee in idle status in excess of 16 hours during a 24-hourday, nor more than 40 hours per week. Standby time will not be allowed unless the equipment has been in idle status in excess of 16 hours during a 24-hour day. Likewise, standby will not be allowed during periods when the equipment would have otherwise been in idle status. Actual operating time during a week will be credited against the 40 hours maximum standby allowance.

* * *

2-3. Marine Equipment.

a. General. Hourly use rates for ownership and operating costs have not been developed for marine equipment since this type of equipment is normally custom designed and built. This section, however, presents the methodology for determining the ownership expense expressed as a percent of equipment value, which is defined as the actual acquisition cost plus

any capital improvements.... Hourly ownership and operating expenses for any land-based equipment involved with the operation will be based on the methodology herein for construction equipment.

b. Ownership Cost. Ownership cost is based on the equipment value and equals th cost of depreciation plus facilities capital. When cost or pricing data is available, the actual equipment value shall be usee. Otherwise, the value of a similar piece of equipment may be used and, if necessary, adjusted so that capacity, size, and horsepower are properly considered.

(1) Depreciation. Depreciation was computed using the straight line method. The annual rate is determined by dividing the depreciable value by th expected normal life of the equipment in years. When the actual age of a piece of equipment exceeds the normal life, one year shall be added to the actual age and the depreciation shall be recomputed. The depreciable value is the acquisition cost, plus any capital improvements, less estimated salvage. Costs for drydocking and major repairs, which occur periodically, are considered a part of operating costs and will be allocated on an equal annual basis over the years between such occurrences, in accordance with paragraph 31.205-24 of FAR.

* * *

(4) Taxes, storage (layup), and insurance are considered indirect (overhead) costs or a part of operating costs (see paragraph 2-2.c.(3)). These are not included in ownership rates since they vary by

geographic areas and with individual contractors. These costs should not be duplicated in the estimate or submitted proposal.

* * *

c. Annual Use. Marine equipment is normally operated 24 hours per day, 7 days per week, and costs are usually kept on a monthly basis. This is the preferred basis. However, if an hourly or daily basis is used, the monthly cost should be divided by the actual number of hours or days the contractor is working. If actual time cannot be determined, the monthly cost should be divided by 720 hours or 30 day s. ...

d. Standby. The standby rate is computed by allowing the full CFC monthly rate plus one-fourth of the monthly depreciation. ... Standby will not be allowed during periods when the equipment wuld have otherwise been in idle status.

* * *

CHAPTER 3 RATE SCHEDULE

3-1. Introduction. ... The rates may be adjusted or recomputed when (a) "Difficult Conditions" are specified by the contract, (b) actual acquisition cost is significantly different from the "Equipment Cost" shown, (c) age is different from that used, (d) license, taxes, storage and insurance costs are charged directly to an item of work, (e) fuel costs differ by more than 10% from the cost shown, and (f) work week exceeds 40 hours per week. Whenever

ne or more of these conditions exist, th rates may be adjusted using the tables in this chapter or computed as shown in the sample computations in Figure 2-1.

(R. 4, Tab 30).

77. As can be seen, the Region I Schedule does not provide rates for marine equipment. It does provide a method for determining ownership costs but not operating costs for marine equipment. Such ownership costs are derived from acquisition costs and other capitalized costs of an item of equipment, less a factor for salvage value. Then, annual depreciation and "Cost of Facilities Capital" (CFC) rates are applied to determine annual ownership costs. In turn, the annual ownership costs can be converted to monthly or hourly rates, depending on the usage of the equipment. (R. 4, Tab 38).

78. A comparison will be useful of the method outlined in the Region I Schedule to the Contracting Officer's actual allowance. We will apply the method to the principal marine equipment involved in this case, the tug ROBERT CHARLES and Barges 34 and 35. They were purchased in the fall of 1983 specifically to work on this contract. Their total acquisition cost (including other capitalized costs) is $162, 184. Since they were purchased for a lump sum, we will make the calculations on a basis most favorable to Shaw. The salvage factor from the Region I Schedule for tugs is ten percent and the factor for equipment barges is five percent; we use five percent. The total annual

depreciation and CVC factor for tugs is 10.17 percent, and the factor for equipment barges is 10.18 percent; we use 10.18 percent. Reducing the $162,184 by five percent salvage yields $154,075 subject to annual depreciation and CVC. Applying 10.18 percent to the latter figure yields an annual ownership cost of $15,685. Since Shaw claims equipment costs from the fall of 1983 to the fall of 1988 (an incredibly long period in this case), we multiply $15,685 by five. The product of this calculation is $78,425. We note that this amount depends on using numbers of hours of standby, as detailed below. The rate applicable to standby uses only one-fourth the full depreciation rate. However, for comparative purposes, we use the full $78,425 figure for the full five year claimed period. Keeping in mind that the Contracting Officer allowed the full book value of $162,184, we see that the Contracting Officer has allowed $83,759 more than the Schedule method, even when we use the schedule method with an extreme five-year period of assumed fully active use. (R. 4, Tabs 1, 2, 25, 28, 38, 82, G-70).

79. Shaw seeks $1,418,926.04, before markups for overhead, profit, and bond premium, for the ownership and operating costs of the tug ROBERT CHARLES. This amount is based on 44,367 hours from the time it was purchased in the fall of 1983 until October 31, 1988. From May 1, 1985, if not before, every single hour of every single day is claimed. In fact, 4536 hours are claimed from May 1, 1988 through October 31, 1988, a number greater than the 4416 hours in that period. As previously

noted, Shaw bought the ROBERT CHARLES and Barges 34 and 35 for use on this contract, paying a combined amount of about $162,134, including capitalized transportation and repairs. The Government allowed every dollar of that amount, plus a markup for Cost of Facilities Capital, and every dollar of operating costs, including repairs, during the period that this equipment was on the job and even after, plus further markups for overhead, profit, and bond premiums. The Government refused to pay repair costs after demobilization was completed in 1986, on the theory that it had already paid the entire cost to Shaw of this equipment, not even deducting for salvage value, so there simply was no basis for Shaw to consider that it had not been paid for all possible wear and tear caused by the job. To the extent that Shaw incurred overhaul costs thereafter, they are not allocable to this job. (R. 4, Tabs 28, 82; TR-B, 1002-1101, 1467-1469, 1650-1654).

80. In arguing against the Contracting Officer's allowances for equipment, Shaw points out that some of its equipment had low book values and some had been depreciated down to zero. However, the Contracting Officer did not adopt the auditor's recommendations for using book values across the board, or for deducting salvage values. He allowed the book values of all equipment in full and took no credit for salvage values, and, whenever equipment was fully depreciated, he allowed the original acquisition cost. The usual method for allowing depreciation in a price adjustment for fully depreciated equipment, and the method included in the Region I

Schedule, is to add one year to the actual age and recalculate annual depreciation based on the acquisition cost. Thus, it can be seen that the Contracting Officer's allowance of full acquisition costs for the fully depreciated equipment was more than adequate. In fact, although some book values were low, the Contracting Officer's calculations of ownership costs as a whole provided a generous allowance. (R. 4, Tabs 28, G-70; Tr-B, 1397-1440).

Tri-County Sand & Gravel, Inc.

81. After Construction Equipment Costs, the next largest category of claimed costs in dispute is for quarried stone. Shaw entered into a purchase order dated February 1, 1984, with Tri-County Sand & Gravel, Inc. of Hope, Rhode Island to "furnish as required, FOB job-site, Point Judith, Rhode Island: 12 to 15 Ton Stone, and 2 to 5 Ton Stone at the Unit Price of $5.00/Ton," subject to some actions by Shaw and subject to certain printed terms and conditions. Shaw was to furnish scales for weighing the stone delivered to the site, to furnish lift pins to be put in holes drilled by Tri-County, to furnish a crane to unload stone at the job site, and to make payments every 30 days based on materials accepted by the Government at the job site. The printed terms and conditions included:

> 14. COMPLIANCE WITH CONTRACTS AND RULES. All labor, materials, and services shall be in strict accordance with the principal contract and the contract documents (which contract documents consist of plans,

specifications, general conditions, special conditions, addenda to any and all of the foregoing, and the contract or subcontract of the Company [Shaw] with the owner [the Government] ....), and shall be approved and accepted by all the parties having jurisdiction. Without in any way limiting any of the other provisions of this order, you shall, to the extent applicable to your labor, materials, and services herein, comply with and be bound by and liable for all the obligations of every kind and description undertaken by the Company under and description undertaken by the Company under its contract.... You shall comply with and be bound by all regulations, rules, interpretations, decisions, orders, and directions of federal, state, and municipal governments and agencies, and all subdivisions thereof, and of the owner..., and of all others authorized by aforementioned principal contract and contract documents.

18. CLAIMS. The Company [Shaw] shall have in relation to you[Tri-County] the same rights and immunities as the owner [the Government] ha[s] as to it, and you shall have the same duties and be subject to the same restrictions in relation to the company as it has to the owner.... All claims, extras or damages asserted by you under this order shall be subject to all the conditions and restrictions governing the assertion by the company of any claims, extras or damages against the owner... or others. The handling of

all disputes between you and the Company, including the types of claim which may be asserted, the furnishing of all notices, statements, proofs and furnishing of all notices, statements, proofs and other documents and data required, and the forum and method for determining such disputes shall be controlled by those provisions of the principal contract... which governs disputes between the company and the owner, ... or others. In no event shall the Company be required to pay to you more than the total it has received from the owner, ... or others because of your claims, extras or damages, less a reasonable amount for the Company's overhead and profit and its expenses in recovering the total. Any claim made by you which in turn is made by the Company against the owner,... or others, shall not be deemed to be an admission by the Company of the validity of th claim, and it shall not be used against the Company in any manner or proceeding.

19. MODIFICATION OR TERMINATION. This order shall be subject to termination or variation under the conditions provided for under the contract ... of the Company. This order may be modified only by the Company's formal written change order and it may be terminated only by writing signed by the Company.

(R. 4, Tabs 10, G-8; TR-B, 261-262, 267-269).

82. On May 23, 1984, Shaw wrote tc

Tri-County to memorialize a modification of the purchase order. The letter stated:

> As discussed at our meeting of 4-30-84, the Purchase Order #860, dated 2-1-84, is hereby modified as follows:
>
> Tom Shaw, Inc. will pay the sum total of $14.00 per ton (an increase of $9.00 per ton) as agreed at our meeting of 4-30-84.
>
> Tri-County Sand & Gravel Co. will perform the removal, loading and delivery of the rock in accordance with specifications as written and agreed between the parties.
>
> Tri-County Sand & Gravel Co. will furnish equipment as discussed and lease additional equipment as necessary to perform the work in question. If Tri-County elects to lease equipment from Tom Shaw, Inc., fair market rates will apply and/or as discussed between the parties. Any equipment leased from Tom Shaw, Inc. will be fully maintained, fueled and oiled by Tom Shaw, Inc., operators to be by Tri-County Sand & Gravel Co.
>
> Tom Shaw, Inc. agrees to trade the lease equipment rental fees for excess stone quarried for possible future contracts. All excess quarried materials (size minus 30") will become the property of Tri-County Sand & Gravel and/or Bettez Construction Company for use in their daily gravel crushing operations and/or as agreed. If materials of this size are required

by Tom Shaw, Inc., the unit price of $14.00 per ton will apply.

Because of the high cost of blasting insurances and materials, all insurances, materials and supplies necessary to perform this work when required will be paid for by Tom Shaw, Inc.

The intent is to have 58,750 tons of stone quarried and delivered to our loading site. It is understood that a smooth and productive operation is required and all efforts will be made to allow minimum rehandling, loading, storage, trucking, and unloading of the stone.

The minimum amount to be paid to Tri-County Sand & Gravel is $75,000.00, no matter how much stone is delivered for use on the above project which is scheduled for 365 days). Any overrun of material, delays, changed orders or conditions will be subject to renegotiation at the time the delay and/or changes are incurred. Winter conditions and operations are not included as discussed and if encountered, will be considered an extra to the project.

Tri-County Sand & Gravel Co. will be held harmless from all actions by Tom Shaw, Inc.

Because of the strongest quality control standards and certified weight master receipts required by the Corps of Engineers on this project, Tom

Shaw, Inc. will furnish quality control and certified weight control personnel as necessary at the quarry to assure and assist your firm in maintaining the quality and standards dictated in the specs for the material in question.

(R. 4, Tabs 10, 42g; TR-B, 270275).

83. A letter dated November 19, 1984, from Mr. William Bettez of Tri-County Sand & Gravel, Inc. to Tom Shaw, Inc., reads as follows:

re: DACW-33-83-C-0070, "Change orders and claims"

Dear Sir:

As a result of our meeting of 11-15/84, our position regarding the production of stone for the above listed project and related change orders and conditions is as follows.

A. About your encountered delays, resulting from change orders and changed conditions. And [sic] additional 10% increase in our unit price will be necessary to cover increased labor and material costs. This 10% increase will be in affect [sic] from the end of the original 365 day contract, for an additional 365 days. Also: original quote $14.00 per ton, 10% increase of $1.40 per ton for a revised price of $15.40 per ton.

B. Further, that to continue quarry operations, an additional $4.00 per

ton for storage, rehandling and adverse weather conditions will be required. [T]his additional fee will begin 11-1-84 and continue for the rest of the contract. It should be noted, that a mobilization fee of $25,000.00 is requested prior to starting work under the above noted conditions and changed quantities as discussed.

C. In regards to your request for confirmation of a unit price, for the change quantities on the 2/5's and 2/10's, our quote is as follows: $21.50 per ton. This includes the additional cost of items A. and B. above, less mobilization fees. This price is firm for 365 days from above noted date.

In closing, please advise us as soon as possible as to your intentions, and forward the payment of the $25,000.00 mobilization fee so that production may start on the 2/5's and 2/10's and also the remaining stone.

(R. 4, Tab 45).

84. An undated letter from Mr. William Bettez of Tri-County Sand & Gravel, Inc., received by Tom Shaw, Inc. on February 2, 1985, reads as follows:

Tom Shaw, Inc.
8215 N. Straits Hwy.
Cheboygan, MI 49721

Atten: Thomas Shaw, As per requested:
Re: Payments received to 12-31-84

Gentlemen:

Tri-County Sand & Gravel, Inc. has received the following funds, from Tom Shaw, Inc., Cheboygan, MI., for rip rap and miscellaneous materials, supplied F.O.B., Davisville, R.I.

$143,917.78

Balance due to date is $14,603.56

Due to distance between parties, payments were made by wire transfer, to expedite payments.

(R. 4, Tab 31).

85. By letter dated March 20, 1985, Mr. William Bettez of Tri-County Sand & Gravel, Inc. wrote to Tom Shaw, Inc., as follows:

Please be advised, that due to your termination, with Tri-County Sand & Gravel, Inc. on 2-09-85, and Corps of Engineers actions of 3-05-85, we can no longer continue our operation, under our previous agreed contracts.

After review of the aggregate source, we estimate that the following approximate amounts of stone are committed to your project: 1500 to 1700 tons of 12-15 ton stone and 5500 to 5800 tons of 205 ton stone; processed and ready for shipment. In addition there is approximately 4000 tons of stone, in a semi-state of process, which are also your responsibility.

It is our position that Tom Shaw, Inc. is responsible, for all of the either processed or semi-processed material presently being stored and impeding our access and present aggregate operations.

The following revised rates are still in effect as per our letter of 11-19-84 and your acceptance letter of 11-21-84. 12-15 ton stone @ $19.40/ton 2-5 ton stone @ $21.50/ton.

The cost to remobilize the stone aggregate operation, as per the original termination notice by Tom Shaw, Inc. of 2-09-85: is in the amount of $12,500. Also yet to be resolved are the balances of the original contract, still due Tri County Sand & Gravel, Inc. Please note that the stone aggregate mentioned above is presently consuming considerable storage ares [sic], impeding the on going operations of our company.

Because the above mentioned issues have not been addressed or resolved, and that because a great deal of money is due and owed our firm, we will not allow, removal of your equipment or access onto the premises, by your men or the Corps of Engineers.

We request your immediate [sic] attention and action in this matter.

(R. 4, Tab 32).

86. A letter dated March 30, 1985,

from Mr. William Bettez of Tri-County Sand & Gravel, Inc., reads as follows:

> Tom Shaw, Inc. Retirement Fund
> 8215 North Straits Highway
> Cheboygan, MI 49721
>
> Re: Processed Rip Rap Stone
>
> Dear Tom,
>
> This letter is to acknowledge receipt of $82,980.00, as payment in full for 13,831 tons of processed rip rap material.
>
> This material is 1st. grade quality and meets the current requirements of the Army Corps of Engineers.
>
> As discussed, we will provide storage for this material until sold.
>
> Present market conditions indicate a good market for this material on State and Federal Projects, which are proceeding at a brisk pace in this area.
>
> Again, we thank you for your prompt payment and assure you that we will do everything possible to assure you of a good return on your investment.

(Exh. A-10). [Spelling and punctuation changes made.]

87. Tri-County submitted a settlement proposal to Shaw dated April 11, 1986, signed by William A. Bettez, Secretary. Mr. Bettez was the manager of Tri-County.

An accompanying certification required by termination regulations (not a Contract Disputes Act Certification) was signed by Mr. Bettez and dated April 13, 1986. The amount claimed was $2,092,423.87 plus stated monthly, weekly, and daily items to be computed later. These items were "Storage of Government Stone @ 4,166.67 Per Month"; "Interference with Tri-County Business at $10,500 Per Week"; and "interest...pursuant to the Contract Disputes Act." Shaw included the Tri-County settlement proposal with its Termination for Convenience Settlement Proposal dated April 11, 1985, certified by Mr. Shaw on April 13, and received by the Government on April 14. (R. 4, Tabs 25, 40(19)).

88. Tri-County summarized the costs contained in its settlement proposal as follows:

1.	Equipment Cost	$700,429.68
2.	Insurance	7,004.30
3.	Miscellaneous Tools	21,012.89
4.	Tri-County Labor	107,542.30
5.	Bettez Labor	69,484.02
6.	Blue Cross/Blue Shield	14,825.08
7.	Modification of Truck Bodies	2,000.00
8.	Chain Link Fence	1,294.95
9.	Deliver and Pick Up Fence	642.88
10.	Attorneys' Fee Backcharge	22,080.00
11.	Material Delivered to Point Judith	1,078.50
12.	Transportation of Test Stone	321.44
13.	Size Stone Delivered to Davisville	321.00
14.	Rhode Island Unemployment Tax Increase	9,162.55
15.	Unpaid Royalties	13,492.90

16.	Interference with Tri-County Business at $10,500 Per Week To Be Computed Later	
17.	Remobilization Between February 11, 1985	38,933.20
18.	Clear Site, Haul and Weigh Stone, and Final Clean Up of Stone Pit	646,045.35
19.	Storage of Government Store at $4,16.67 Per Month To Be Computed Later	
	Subtotal	$1,655.671.04
20.	Tri-County Overhead of 15%	248,350.66
	Subtotal	$1,904,021.70
21.	Tri-County Profit at 10%	190,402.17
	TOTAL (without interest)	$2,094,423.87

(R. 4, Tab 25(18)).

89. Item No. 1 for Equipment Cost included equipment belonging to Shaw that was used at the quarry site. The amount was calculated using Shaw's figures derived from use of the Region I Schedule. The Contracting Officer actually included an allowance of $86,277 plus markups in termination payments to Shaw for Shaw's equipment used at the quarry. (R. 4, Tabs 1, G-70, G-71; Exh. R-3; TR-B, 1322-1373, 1674-1675).

The Tri-County Arbitration

90. In early 1987, without consultation with the Contracting Officer, and without any requirement for arbitration under their purchase order agreement, Shaw and Tri-County agreed to an arbitration proceeding. The "Demand for Arbitration" is dated January 19, 1987. Though the form is designed to be used by "a party to an

arbitration agreement contained in a written contract ... providing for arbitration" and calls for the date of the written contract to be inserted and for "arbitration clause" to be quoted or attached, Tri-County merely typed "oral agreement" in the space provided for the date of the written contract, and no arbitration clause was quoted or attached. The date of the arbitration clause was quoted or attached. The date of the referenced "oral agreement" is not disclosed. The Boston office of the American Arbitration Association, by letter dated February 4, 1987, wrote to Shaw and Tri-County that it had received Tri-County's demand on February 2, 1987. The letter stated inaccurately, that the contract between Shaw and Tri-County "contained a clause providing for administration by this Association." By letter dated February 18, 1987, Shaw and Tri-County informed the Association of "certain agreements" they had reached "concerning the arbitration of Tri-County's claims arising out of Tri-County's subcontract with Tom Shaw under Tom Shaw's prime contract ...." Two of these agreements were:

> 3. ... Tri-County hereby stipulates that if Tom Shaw chooses to utilize [the law firm will not object in any way to their participation in this arbitration or any related legal proceedings notwithstanding their past discussion and work with Tri-County related to Tri-County's claims against Tom Shaw.
>
> 4. Tom Shaw reserves all right it has

against Tri-County (i.e., claims, counterclaims, or offsets) and may assert same against Tri-County subsequent to the culmination of this arbitration. Tom Shaw and Tri-County agree to submit any such claims, counterclaims, or offsets to arbitration. Tri-County hereby agrees to toll the running of the applicable statutes of limitation on Tom Shaw's claims, counterclaims and offsets against Tri-County until such time as Tri-County shall inform Tom Shaw in writing otherwise.

(R. 4, Tab 33; TR-B, 290-293).

91. Apparently, Mr. Shaw first discussed the arbitration proceedings with Government representatives on February 20, 1987. This discussion was mentioned in a letter dated March 2, 1987, from Mr. Shaw to Mr. McCulloch, Division Counsel for the Corps in New England. The letter stated that "because of the status of this matter, [Shaw and Tri-County] have submitted to arbitration Tri-County's claims arising from the Corps' termination for convenience." Mr. Shaw's letter stated further: "... because of the financial crisis th Corps has caused Tom Shaw through its act and failings, I intend to personally defend this arbitration. The Corps' failure to fairly reimburse my attorney's fees prevent my retention of independent counsel for this action. However, consistent with DAR 8-209.5(a)(iv) Tom Shaw hereby gives the Corps the opportunity to assume control of the defense of these procedings." (R. 4, Tab 33).

92. The Government declined to

participate in the arbitration proceedings. (Exh. R-5, p.5)

93. The arbitrator heard the case between Tri-County and Shaw in two sessions. The first session was on May 28, 1987. Mr. Shaw represented Shaw. Tri-County presented its monetary demands in the form of the termination settlement proposal it had furnished to Shaw on April 11, 1986, and which Shaw had included in its termination settlement proposal to the Government. Mr. Shaw generally acquiesced n Tri-County's presentation and even suggested additional costs that could be claimed. Besides a general statement that anticipatory profits and consequential damages were not allowable, the only doubt he raised was whether there was any overlap of the charge for storage of "Government" stone and the claim for interference with business allegedly caused by the "stored" stone. He did not even argue that the claim for interference with business amounted to consequential damages. A review of the transcript reveals not the slightest indication of the serious opposition to Tri-County's claim one would expect from a party who would be expected to pay what the arbitrator might award. In fact, the focus of the hearing seemed to be on the rights that Shaw and Tri-County had against the Government under the terms of the termination for convenience clause of the prime contract and the undrlying regulations. Mr. Shaw even described his role at the hearing as discharging an obligation to protect the Government's interest and minimize the damages to the Government. Despite that description, he generally complained to the arbitrator of

mistreatment by the Government. The arbitrator seemed to believe that he was arbitrating a claim against the Government. He stated, in fact, "... I would advise both parties, because of the amount of monies involved ... to notify the Corps of Engineers again that the arbitrator wants to notify them that this arbitration is going forward at their peril." [Emphasis added.] The arbitrator also stated to Mr. Shaw that he would leave the record open so that Shaw's attorney could review the transcript, and then both attorneys could set another hearing date (i) to present positions on the amount of damages that would be "fair and equitable," (ii) to provide information on the extent to which mitigation of damages may be required by the Defense Acquisition Regulation (DAR, and (iii) to provide guidance on whether the Government had title to the processed and partially processed stone still at the Tri-County quarry. (Exh. R-4; Tr-B, 335-336).

94. The second and final session of the arbitration hearing was held on June 15, 1987. Mr. Shaw still purported to represent Shaw. However, the attorney who was primarily active for he law firm that represented Shaw in all other matters involving the prime contract during that time period was present. When asked by the arbitrator the capacity in which he was present, that attorney responded: "I'm here.. at your request; that, as you will recall from the last session, Tom Shaw advised you and the panel that because of the financial crisis which has been created for himself and his company as a result of the Corps of Engineers' termination of his

contract for the convenience of the Government and as a result of eh Corps of Engineers failure to adequately and timely provide him with interim financing, it is Mr. Shaw's position that he was unable to retain independent counsel to assist him in this arbitration." The attorney went on to offer into evidence copies of letters to the Corps from Shaw and himself asking the Corps to assist Shaw in the defense of the arbitration. He quoted his letter of May 20, 1978, as stating:

> As Tom Shaw has repeatedly informed you, Tom Shaw does not have sufficient resources to allow us to attend the arbitration. Therefore, out of necessity, Tom Shaw was forced to defend this matter himself. You informed us that the Corps of Engineers has not intention of attending those hearings or in assisting Tom Shaw in the defense of this matter as he previously requested.

The attorney went on to state:

> Later, after the initial hearings were concluded, which Tom Shaw did not have outside counsel assist him at, I spoke with Richard Carlson, the Chief of Construction of the New England Division and advised Mr. Carlson that on June 15 that the arbitration was going to reconvene, at which time, based on a request by you [the Arbitrator], I would attend that meeting for the purpose of assisting you in reaching a decision on the merits of this matter. Therefore, when

you asked what capacity I am present here today, the answer is I am here to assist you ... as an arbitrator for this matter and to help you with any matters or any questions you may have relating to the Termination for Convenience or any matters or any other questions you may have.

(Exh. R-4).

95. The attorney presented material to the arbitrator on termination for convenience settlements under federal contracts, and his advise to the arbitrator was entirely in the context of what Tri-County was entitled to claim and the Government (not Shaw) was required to pay under a termination for convenience. He mentioned some obvious defects in Tri-County's money demands. Specifically, he advised that the claim for interference with business involved consequential damages was not allowable. He opined that claim item 15 for unpaid royalties amounted to anticipatory profits or consequential damages and was not recoverable. Tri-County withdrew those claim items. He also opined that storage costs in general were allowable but that the remaining stone for which storage was claimed was <u>not</u> Government property. However, both Tri-County and Mr. Shaw disagreed. (At the Board hearing, Mr. Shaw testified erroneously that he had opposed the storage fees and had been successful.) (Exh. R-5; Tr-B, 295).

96. The attorney also made the following statements:

> At this stage, I would like to remind you [the Arbitrator] that I have not been retained by Mr. Shaw to do or assist him with the Tri-County claim. (Exh. R-5, p. 14)
>
> I think it will come clear from the articles that I gave you, but the law on the termination is clear that the objective that the government must have, and that arbitrator must have, is to make the contractor financially whole and it's to place him in a position as if he never had the contract, and as the article points out, it becomes a very difficult situation. (Exh. R-5, p.15)

97. In representing Shaw, Mr. Shaw did not point ut to the arbitrator that Tri-County would have been entitled to a much lower payment if it had completed delivery of all 58,750 tons of stone estimated for completion of he work than it was seeking for delivering only about 8,900 tons of stone, and for working on no more than another 10,000 tons which were in various stages of completion at the quarry when Shaw's contract was terminated. He also did not mention the provisions of the termination regulations limiting recovery of costs to the purchase order being performed at a loss (R. 4, Tab 25(18); Exhs. R-4, R-5).

98. On September 11, 1987, the arbitrator's award was issued, providing as follows:

> Arbitration was commenced peroral agreement between the parties in order

to save the expense involved in litigating the matter in Federal Court. The Arbitrator having heard all of the evidence and reviewed same makes the following award:

Tri-County Sand & Gravel, Inc. is awarded a decision in its favor in the amount of One Million Nine Hundred Two Four Hundred Nineteen Thousand [sic] and 21/100 Dollars ($1,902,419.21) as of August 31, 1987. The additional sum of Five Thousand Four Hundred Sixteen and 67/100 ($5,415.67) Dollars is to be added on said award each month commencing September 1, 1987 and thereafter until the Government Stone is removed or released to Tri-County Sand & Gravel, Inc.

Interest is awarded on the entire award from the date the United States Contracting Officer received the aforementioned claim at the interest rate established by the Secretary of the Treasurer [sic] and Treasury rates. Said interest rate being increased or decreased in accordance with the adjusted rates set forth by the Secretary of the Treasury every six months thereafter.

Arbitration fees and costs of stenographic records are to be shared equally between the parties.

(R. 4, Tab 34).

99. By letter dated September 19, 1987, to the Contracting Officer, Shaw's

attorney forwarded Shaw's invoice seeking payment of a total of $2,717,881.71 to cover the arbitrator's award, including $2,708.35 for ne-half month storage (to September 15, 1987) and $230,050.62 interest for Tri-County (from April 11, 1986 to September 15, 1987), plus Shaw's markups of $320,276.73 for overhead, $245,545.50 for profit, and $16,881.25 for additional bond fee. The invoice included a Contract Disputes Act certification from Mr. Shaw. Shaw's attorney indicated that an upward adjustment would be expected for the time between September 15 and payment. (Exh. 17 to Motion for Partial Summary Judgment on Arbitration Award.

100. The Contracting Officer's letter of November 18, 1987, responded to Shaw's attorney in detail. The Contracting Officer pointed out several weaknesses in the arbitration proceedings, including that the award far exceeded the purchase order price and, even if accurate as to Tri-County's costs, would require treatment of the purchase order as a loss contract, with a consequent reduction of recovery. The Contracting Officer also pointed out that the Government did not own the stone that Tri-County alleged it was storing for the Government, and that Mr. Shaw had failed to inform the arbitrator that Tri-County was estimating its equipment costs by a controversial method already disputed by the Government. The letter also included the following paragraph:

> I have a number of other reasons for questioning the Government's responsibility for payment of the arbitration award. First of all, it

is evident from my review of the transcript of the arbitration proceedings that there wa little or no disagreement between Tri-County and TSI during the proceedings about the costs claimed by Tri-=County in the settlement proposal. The proceedings appear to have been a matter of form, with Tri-County describing the claim items and citing dollar amounts, on the one hand, and TSI agreeing, on the other hand, with the statements made by Tri-County. I make this observation even though Tri-County withdrew two claim items during the course of the proceedings. One of the claim items was for $10,50 a week for interference with business relations, and the other for $13,492.90 for unpaid royalties. Those were not significant concessions by Tri-County because all of the parties, including Tri-County's attorney, agreed that those items represented consequential damages which are not recoverable in termination actions. This causes me to wonder why those claim items were presented to the Contracting Officer as certified, allowable costs in the first place.

(R. 4, Tab 35.

101. Notwithstanding the fact that Shaw alleged that it could not afford to be represented by counsel in the arbitration proceedings, and was represented only by Mr. Shaw, a layman, attorneys from the law firm then representing Shaw in its termination claims and litigation with the Government consulted with Mr. Shaw at great

length and considerable expense about the Tri-County claims and other matters before, during, and after the arbitration proceedings. In fact, it appears that they had a large part in preparing the very claim presentation that Tri-County first submitted to the Government through Shaw (with Mr. Shaw's certification that it wa "fair and reasonable") and that Tri-County then presented to the arbitrator as the basis for its claim in the arbitration proceedings. The law firm billed Shaw for this consultation, an Shaw, in turn, billed the Government, including the fees for "assistance" to the arbitrator at the second arbitration hearing. In fact, although the record is not entirely clear on this point, it appears that the Contracting Officer reimbursed Shaw for some (clearly not all) of the attorneys' fees relating to the Tri-County arbitration as part of eh allowed settlement expenses. (R. 4, Tabs 1, 2, 37, G-70, G-71; Exhibit 3 to EAJA Application on Interest Issue).

102. Some miscellaneous findings with respect to Tri-County include the following.

(a) We find, from the only detailed estimate of stone remaining at the quarry after the termination, that the maximum amount of non-waste stone left at eh quarry was 2,20 tons. The full price for 2,200 tons <u>delivered</u> was $30,800.

(b) Much of the tone viewed by the arbitrator during his site visit to the quarry was undersized but erroneously marked by Shaw or Tri-County employees as acceptable armor stone.

(c) Tri-County eventually submitted to an audit as a result of a Board order in 1989. Its looks were generally unsuitable for determining its costs of performing work under the Shaw purchase order. Tri-County's termination cost proposal, as such, was essentially not verifiable by audit because it consisted mostly of estimates. There were duplications of claimed costs in various items of the proposal.

(R. 4, Tabs 42G, 70H, G-48, G-71; TR-B, 628-695, 695-748, 753-772, 1322-1378).

Miscellaneous Rejected Costs

103. There are a number of miscellaneous cost items that the Contracting Officer did not allow and that the parties till dispute. They were the subject of a Joint Submission, dated March 11, 1988, in the Claims Court, and were addressed as Paragraphs 12(a) through 12(o) in the Contracting Officer's Supplemental Decision of April 27, 1988. Shaw's Opening Brief discusses them as Cost Issues 1 through 15, and adds five "Other outstanding Costs" which we number 16 through 20. We mention them further in the Decision portion of this Opinion. These items ar identified as follows:

1. Propriety of Second Allocation of Overhead in Audits.
2. Discrepancy in Baseline Amount in Audit Report No. 1.
3. Peter Patrick Fees.
4. Reclassified Entertainment Costs.
5. Attorney Fees.
6. Davis Bacon Act/Contract work

Hours Act Withholdings.

7. Mel Pearl Cash payment.

8. Out of Pocket Costs Related to Arbitration

9. Restoration/Repair Costs on Equipment.

10. Pending Litigation.

11. Accrued Liabilities.

12. Contract Disputes Act (CDA) Interest.

13. Profit.

14. Bond.

15. Audit of Costs after 1 October 1987.

16. Cost of Borrowing.

17. Subcontractor Claims.

18. Tool Purchase.

19. Tri-County Rental Invoice.

20. T.S. Aviation.

(R. 4, Tabs 1, 2, 25, 27, 28, 35, 70D, 74, 75, 76, 86, 87, 88, 89, 90, 91, G-70; TR-B, 286-288, 385, 432-439, 1314-1321; TR-C2, 4-121; TR-C3, 4-49).

Settlement Expenses

104. The Contracting Officer allowed $282,550.00 for settlement expenses, largely for fees and expenses of Shaw's attorneys at that time (not the firm now representing Shaw, which was brought in shortly before the hearing). Included in the allowed figure is the amount of $93,153 for the period of October 1987 through February 1988. Shaw seeks further payments, amounting to at least $62,692 plus markups, for what it calls Post Termination October 1987 Settlement Expense. In addition, part of the $132,994.10 it seeks as a separate item for

Attorney Fees was originally submitted as settlement expenses. (R. 4, Tabs 1, 2, 27, 28, 37, 86, G-70).

DECISION5

Contract Price as Ceiling

The most important issue to be decided is the effect of the contract price as a ceiling on any potential further payment to Shaw arising from the termination for convenience. The Board has found, and Shaw concedes, that the Government has already paid Shaw an amount in excess of the established contract price, which is $2,274,749.40. The Board has already ruled during pretrial proceedings that Shaw has the burden of proving a basis for increasing the contract price in order to receive any further payment (except for any additional settlement costs or Contract Disputes Act interest that may be due).

Shaw does not dispute the effectiveness under some circumstances of the contract price as a ceiling on recovery. Such a result is clearly spelled ut in paragraph (d) of GP-18, which provides that the Contractor and the Contracting Officer "may agree upon the whole or any part of the amount ... to be paid to the Contractor by reason of the total... termination of work pursuant to this clause, which amount ... may include a reasonable allowance for profit on work done; provided, that such agreed amount ..., exclusive of settlement costs, shall

not exceed the total contract price as reduced by the amount of payments otherwise made ...." (emphasis added) The same result also obtains under paragraph (e) of GP-13, which applies t unilateral determinations by the Contracting Officer when full agreement cannot e reached with a contractor.

Despite the general operation of the contract price as a ceiling, Shaw makes the following arguments in opposition to the present effectiveness of eh contract price as a ceiling in this case:

> [1] Once the Government has made a settlement offer in excess of the Contract price, the Government has forfeited the right to use the Contract price as a limitation on a termination cliam, American Electric, Inc., 76-2 BCA ^80,160 [sic].

5The Decision portion of this Opinion may refer to facts not explicitly found in the formal Findings of Fact portion; all facts are nevertheless derived from the record as a whole.

> [2] Undefinitized changes occurring during Contract performance justify an increase to the Contract price -- thereby making the ceiling limit of the Contract price inapplicable, Agrinautics, Inc., 79-2 BCA ^14,149 and Riverport Industries, Inc., 87-2 BCA ^19,876.
>
> [3] A Cardinal Change enables the

Board to award all damages to Appellant, irrespective of the current Contract price, Saddler v. U.S., 287 F. 2d 411 (Ct. Cl. 1961).

These arguments and the cited cases do not change the result in this case. (1) No forfeiture of a right to apply the contract with a settlement offer, a partial settlement, or a unilateral determination. (2) The contract price does not become inapplicable as a ceiling because of undefinitizd changes occurring during performance, though any proven change or similar compensable event, price accordingly by whatever amount is proved, and thus increase the ceiling. (3) Shaw has not established that there was a cardinal change.

By making a settlement offer or unilateral determination in excess of the contract price, the Government has not forfeited the right to limit recovery to the contract price. The case cited by Shaw, American Electric, Inc., ASBCA No. 16635, 76-2 BCA ¶12,151, aff'd in part and mod. in part on other grounds, on recon., 77-2 BCA ¶ 12,792, is entirely irrelevant to the termination of a fixed price contract. American Electric involved a cost reimbursable letter contract or urgent development and production of a "bomblet" for use in Viet Nam. The intention was eventually to negotiate a cost-plus-incentive-fee contract. The contract was never definitized, however, because of doubt about the technical performance of the bomblet. The whole point of a letter contract is to get work started on urgent defense needs before a definitive contract

can be negotiated. There was a Limitation of Government Liability (LOGL) provision in the letter contract, but the Government had the right to, and did, require performance after the cost limitation was exceeded. The ASBCA held that, under the facts of American Electric, the Government had waived the cost limitation of the LOGL clause. The ASBCA cited cases involving the well-established principles of waiver of cost limitations in "Limitation of Cost" clauses of cost reimbursable contracts. At p. 58,489 it stated: "We have no hesitancy in holding that in LoGL clause situations the Government waives the ceiling set forth in th clause if in, knowing that the limitation has already been exceeded, orders continued performance which necessarily involves the incurrence of additional costs." we consider American Electric to be totally inapplicable to Shaw's situation, both in law and n fact.

The other two BCA cases cited by Shaw are consistent with the Board's position and do not hold that a contract price ceiling becomes "inapplicable." The Arginautics case involved raising a contract price by precise amounts for several specific compensable events, and even refusing to raise it for another such event where the Contractor had not adduced adequate quantum evidence. The Contractor was then found to be entitled to a specific sum which was within the adjusted contract price. The Riverport case involved entitlement issues as to constructive changes which could take th Contractor ut of the "loss contract" position found by the Contracting Officer. The ASBCA found that th Contractor had incurred additional

costs arising from constructive changes, for which the Contractor was entitled to an increase in contract price, and that "[t]he contract price thus increased shall be used in determining [the Contractor's] recovery of incurred costs in the settlement of its termination claim." The matter was remanded for actual determination of amounts due.

In addition to the inapplicability of the cases cited by Shaw, the termination clause itself is inconsistent with the argument that the contract price ceiling is forfeited, waived, or becomes that the contract price ceiling is forfeited, waived, or becomes inapplicable when a Contracting Officer offers or pays an amount in excess thereof. GP-18 (j) provides for repayments of overpayments, with interest, as follows:

... If the total of ... payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97 for the Renegotiation Board, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government....

The overall theory of the Termination for Convenience clause for fixed-price construction contracts, if not its wording, is relatively straightforward. The idea is that, if the Government terminates a fixed

price contract during performance, the Contractor is relieved of some of the work (and its cost) that would otherwise have been required for the established contract price. On the other hand, there are new burdens on the contractor price. On the other hand, there are new burdens on the contractor that would not have been present if the contract had been completed. One of those burdens is the need to prove costs. The theory is that a contractor should be paid all costs to it of performing the terminated contract, and, in addition, should be paid settlement costs (the costs of proving performance costs to the Contracting Officer, and other reasonable costs incidental to the termination rather than to the basic contract work - see DAR 15-205.42(f)). Unless it is established that completion of the contract would have resulted in a loss to the Contractor, the costs of performance, though not on the settlement costs. The total of costs of performance and profit are limited to the current contract price. However, if it is established that the termination rescued a Contractor from a potential loss if the contract had been completed, then the Contractor is not entitled to profit on its performance costs. Furthermore, if the costs to complete the work can be determined, the Contractor's actual performance costs are to be reduced to reflect the rate of loss being experienced. Thus, a Contractor terminated for convenience loses some of its expected profits on a profitable contract (anticipatory profits on work not completed), but, on a loss contract, suffers only a pro rata share of the loss it would likely have suffered if the

contract had been completed.

As noted above, a principle applicable to the termination for convenience of a fixed price contract is that the total of costs and profit recovered cannot exceed the existing contract price, unless a basis to increase that price, and the amount of such an increase, can be established. However, the addition of settlement costs can result in total payments to the contractor exceeding the contract price. The theory is that the contractor should not receive more than the contract price for doing less than the full amount of work required by the contract. As long as the contract price is not exceeded and no issue of a loss contract is involved, no attention need be given to unrecognized or unresolved changes or similar matters that may (or may not) justify a contract price increase. The bulk of termination for convenience cases that are reported in Court and BCA decisions do not involve issues of the contract price as a ceiling on recovery or of loss contracts. In such routine cases, the costs of alleged changes or other such events, whether those events are proved or not, are automatically recovered as part of total costs.

Because most terminations do not involve issues of the contract price as a ceiling, many of the BCA cases refer to the termination of a fixed price contract as tantamount to converting it to a cost reimbursable contract. This is an oversimplification. While the cost principles applicable to cost reimbursable contracts do come into play in a termination for convenience, the principles that the contract price serves a ceiling on

recovery, that a profit allowance is partially or totally eliminated on a loss contract, and that recovery of actual costs may be reduced by a loss factor, also come into play. These principles are not consistent with treating the fixed price contract as actually converted to a cost reimbursable contract.

Of particular note is the fact that the contract price ceiling is not at all related to the use of a Limitation of Cost or similar clause in a cost reimbursable contract, as argued by Shaw. As explained above, the contract price as a ceiling is logically related to the fact that payments under a fixed price contract related to the fact that payments under a fixed price contract would amount to the contract price if the work were completed. There is no automatic justification for paying more than the contract price for doing less than fully completing the work. A fixed price contractor has not, in incurring performance costs, relied to its detriment on the fact that the Government, after performance has ended, has made payments exceeding the contract price. There is even less logic to an argument that making payments that exceed the contract price is an act that totally forfeits or waives any further ceiling on payments. Paragraph (j(of GP-18 even provides for recapture of such excess payments.

On the other hand, a cost reimbursable contractor largely controls the rate of expenditures and the total costs of its contract as the work proceeds, and is uniquely able to warn the Government that actual expenditures are approaching any

preset funding limit, giving the Government the option of continuing to fund additional work or ending the contract. That is the primary purpose of a Limitation of Costs clause. When such a warning has been given, whether formally or constructively, the Limitation of Costs clause has served its purpose. If the Government then permits the work to continue, the cost reimbursable contractor continues to incur costs in reliance that it otherwise could have avoided, so the waiver theory has a logical application. The case law on waiver of Limitation of Costs and similar clauses deals strictly with cost reimbursable contracts that are such from their inception. A terminated fixed-price contract is not converted to a true cost reimbursable contract, and there is no reasonable basis to extend the waiver concept to this case.

Should the Contract Price be Raised?

Shaw asserts that there are adequate reasons, in any event, to raise the contract price to accommodate payment of all its claimed costs. The asserted bases have been dealt with in the Findings under the separate appeals filed for the purpose of raising the contract price. The separate appeals are decided below.

Docket No. ENG BCA 5620

This appeal involves Shaw's version of the significance of Job Change No. 2. Shaw asserts that Job Change No. 2 was a recognition of Shaw's position that there was far more work to be done on the seaward side of the breakwater than was indicated

by the contract drawings. As the Board has found above. Job Change No. 2 was itself a change that potentially could have shifted work from the harbor side to the seaward side, but it did not do so significantly before the work was terminated, and, in any event, was in no way a recognition of Shaw's position as to what was indicated by the drawings. If Mr. Shaw made the interpretation he claims to have made, it was unreasonable as to the "Typical Sections" themselves, as to the contract drawings when read as a whole, and, in any event, in light of what a reasonable pre-bid inspection of the seaward side of the breakwater would have disclosed. This appeal is DENIED.

Docket Nos. ENG BCA 5621 and 5622

These two appeals have been combined, and deal with the alleged effect between Stations 31+37 and 43+00 of what Shaw claims was a misinterpretation by the Government of the requirement for the long axis of armor stone to be perpendicular to the length of the structure, and to a lesser and, in fact, unascertainable degree, the effect of roughly rectangular stones being required also to be perpendicular to the slope they were in. Shaw seeks to raise the contract price by $375,157.00 through these appeals. As noted in the Findings, we do not believe that stone placement was actually affected by a dispute over perpendicularity requirements. The real problem causing rejection of work was lack of adequate interlocking. We are not persuaded that Shaw encountered constructive changes or other compensable events in connection with

ENG BCA Nos. 5621 or 5622. These two appeals do not provide a basis for raising the contract price. They are DENIED.

Docket Nos. ENG BCA 5623, 5625, and 5675

These appeals involve a change requested by Mr. Shaw in the size of stone required to fill some holes in the minor repair area at the west end of the breakwater. Mr. Vilkas agreed that those holes could be repaired satisfactorily with the smaller and less expensive 2- to 5-ton stone rather than with the specified 12- to 15-ton stone. The estimated quantity of 12- to 15-ton stone was reduced by 3,500 tons and the estimated quantity of 2- to 5-ton stone was increased by the same amount. Shaw seeks to raise the contract price by a total of $319,150 because of this change, partly on the basis that the change reflected more general compensable events. However, Shaw has not persuaded us that it encountered differing site conditions, constructive changes, or other compensable events in connection with these three appeals, or that this minor change increased the cost of the work. On the contrary, it was clearly a change that reduced the cost of the work. The smaller stone was much easier to handle and set, and, to salvaged small stone rather than quarried armor stone, itself a saving in cost. These three appeals provide no basis to raise the contract price. They are DENIED.

Docket No. ENG BCA 5624

Shaw seeks to have the contract price raised by $11,347.28, its estimate of the cost of retrieving a steel spud that turned out not to be on of its own lost spuds. As noted in the Findings, this retrieval was incidental to Shaw's routine compliance with the contract terms. It was not ordered by the Government and did not reflect a change in the contract, nor has Shaw shown it to be the result of a differing site condition. There is no doubt that Shaw is entitled to include the cost of this work as part of its total costs, or, indeed, that it has already done so. However, it is not entitled to have the contract price raised because of this work. This appeal is DENIED.

Docket Nos. ENG BCA 5626 and 5628

These two appeals cover what Shaw describes as "time and material charges" for post-termination movement of stone from the Davisville dock to the breakwater site. Shaw seeks to raise the contract price by a total of $989,944.70 for this work. Whatever actual costs were incurred are included in the total costs which are the subject of the overall termination settlement. The work itself was a small part of regular work already required under the contract (transportation of stone to the breakwater site). Even if this work were regarded as a change because the stone was only stockpiled instead of set in the breakwater, it would be a change that clearly reduced work effort and costs of performance, and therefore should reduce the contract price. As noted in the Findings, there was an unsuccessful attempt to agree on labor and equipment rates for

this work, solely for the purpose of interim payments, but there was never an agreement that this work was somehow to be excluded from the total cost basis for a termination settlement. These two appeals provide no basis for an increase in the contract price. They are DENIED.

Docket No. ENG BCA 5627

Shaw seeks to raise the contract price by $1,943,111.85 for estimated demobilization costs. Mobilization, demobilization, and cleanup are necessary elements of the contract work. They do not provide a separate basis for raising the contract price. Furthermore, the estimated increase sought by Shaw is inadequately supported and, in fact, incredible. Actual demobilization costs were covered, generously, by the Contracting Officer's allowances. This appeal is DENIED.

Docket No. ENG BCA 5541

Although consolidated with all the other Shaw appeals for hearing and decision, this appeal has not been used as a vehicle for raising the contract price. It appears that the Claims Court probably did not have jurisdiction over this case at the time it transferred it to this Board.6 The Claims Court action was brought on the Contracting Officer's termination for default of Shaw's right to proceed with any remaining post-termination work. Despite Shaw's attempt to include a monetary claim, that monetary claim was not ripe for suit or appeal, since it had been filed with the Contracting Officer fewer than sixty days before the claims Court action was filed

and had not been denied. Indeed, that monetary claim is included in ENG BCA No. 5628, one of the separate appeals to us to raise the contract price. The authority for the Claims Court probably not having had jurisdiction is Overall Roofing & Const. Inc. v. United Stats, 929 F.2d 687 (Fed. Cir. 1991). Overall Roofing did not discuss the possibility of a transfer to a Board of Contract Appeals (as was done in this case(, which has at least direct jurisdiction over an appeal of a bare Termination for Default according to Malone v. United States, 849 F. 2d 1441 (Fed. Cir. 1988). In any event, even if it is properly before us, ENG BCA No. 5541 is moot. The termination for default that was the subject of this case was withdrawn by the Government on August 28, 1986, and became merged with the termination for convenience in ENG BCA No. 5540. Any motions pending under ENG BCA No. 5541 were denied by Board Order dated May 23, 1989. Therefore,

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6As noted in Footnote 3, above, the Claims Court is now th United States Court of Federal Claims. Besides this name change, the Federal Courts Administration Act of 1992 also provided retroactive jurisdiction over non-monetary claims in cases still pending in that Court.

Other Cost Issues

We have found no proper basis for us

to increase the contract price, and payments have already exceeded the contract price. The operation of the contract price as a ceiling on recovery of costs has made any further payments to Shaw inappropriate (except), possibly, in the area of settlement expenses or CDA interest(. Therefore, our decisions on the issues of construction equipment costs, Tri-County costs, and miscellaneous costs rejected by the Contracting Officer would not result in further payments to Shaw. However, since those cost issues have some possible bearing on the issues of loss of a profit allowance and application of a loss factor to amounts already paid, and since the parties have spent much effort on those issues, particularly the construction equipment costs and Tri-County costs, we state our views on them briefly.

Construction Equipment Costs

Shaw argues that the Government has improperly used cost data from Shaw's accounting records to derive allowances for ownership and operating costs of Shaw's construction plant and equipment. Shaw considers the figures in its accounting records incomplete and inaccurate with respect to depreciation, and to overhaul expenses (some of which are yet to be incurred) to restore the equipment to its alleged condition at the start of the work. In any event, Shaw argues that the data from its accounting records should not be used because the contract calls for a different method of determining allowances for equipment under the circumstances here, the Region I Schedule. Notwithstanding its argument that the contract calls for the

use of the Region I Schedule, Shaw is not satisfied with the ownership and CVC rates that would be derived by applying that Schedule to marine equipment, and Shaw acknowledges that the Schedule does not provide for operating costs of marine equipment. Shaw asks the Board to determine a marine equipment cost allowance (or perhaps an entire equipment cost allowance) by jury verdict.

The Board has no doubt that actual ownership and operating costs for Shaw's equipment can be ascertained from Shaw's books and records. The Board is satisfied that the Government auditors have identified those costs. The issue that remains with respect to them is whether, notwithstanding their availability, the contract requires that they be ignored in favor of estimates derived by a different method of calculating equipment costs.

As noted in the Findings, the contract contains SP-33, "Equipment Ownership and Operating Expense Schedule (1981 JUNE OCE)," which provides in part: "Whenever actual ownership and operating costs for each piece of equipment or equipment groups of operating costs for each piece of equipment or equipment groups of similar serial [sic] and series cannot be determined by the Contracting Officer from a contractor's accounting records, allowable costs for construction equipment in sound workable condition owned or controlled and furnished by the contractor or subcontractor at any tier for work requiring adjustments in contract price shall be determined in accordance with applicable provisions of the "Construction

Equipment Ownership and Operating Expense Schedule," Region I. ..."

Shaw argues that all costs of each piece of equipment cannot be ascertained from its accounting records as separate items, and, thus, that the conditions of SP-33 for use of actual ownership and operating costs have not been met. This being th case, goes the argument, the applicable Construction Equipment Ownership and Operating Expense Schedule (known in this case as the Region I Schedule) must be used in lieu of actual costs. The Government acknowledges that some of the costs shown in Shaw's accounts, field costs, for instance, are not broken down by each specific piece of equipment. However, the total of fuel costs for all equipment is shown, as are the totals for parts and repairs, and other costs not accounted for in terms of individual pieces of equipment.

The Board understands Shaw's semantic argument but is not persuaded that the wording of SP-33 rules out the use of actual costs in favor of estimates in determining total costs under a termination for convenience. Actual costs are given priority in SP-33 and are available. Shaw does not contend that the audits inaccurately reflect the costs shown in Shaw's books. Case law lends support to the priority of actual costs where they are available in whole or in part. See, Meva Corporation v. United States, 206 Ct.Cl. 203, 511 F.2d 548 (1975); Brezina Construction Co., Inc., IBCA No. 757-1-69, 73-2 BCA 10, 195. While the intended meaning of "each" in the context of SP-33 is not entirely clear, the record suggests

that it was intended only to differentiate equipment involved in a particular pricing action from equipment not involved in that particular change or other compensable event. It is not customary, and probably not practicable, to keep records of common costs, such as fuel, by each separate item of equipment. Shaw's argued reading would make illusory the apparent right of the Contracting Officer under SP-33 item of equipment were practicable, Shaw's argued reading would permit a contractor unilaterally to defeat the Contracting Officer's right to use actual, ascertainable costs. A contractor could do so simply by choosing not to separate some equipment costs in its accounts.

The great majority of "adjustments in contract price" involve the comparison of actual costs for portions of the work to estimates of what the cost of those portions would have been but for changes, differing site conditions, or other compensable events. In such cases, the use of estimated costs for equipment is often necessary or desirable. That cannot be said of the unusual situation here, however, where we are dealing with total costs of performing the contract, and those costs are available in the Contractor's accounting records. It is not even clear that the phrase "for work requiring adjustments in contract price," as used in SP-33, is meant to apply to the determination for total costs under a termination for convenience. Even assuming that it is, however, Shaw did not rely on its present reading of "each" in preparing and submitting its bid, so there is no valid basis for the application of the

contra proferentum rule, even if Shaw's argued reading could be considered reasonable in this context. Finally, even if the Region I Schedule is applied here, the Schedule itself calls for a consideration of Shaw's actual acquisition costs and the specifics of the age of the equipment, as well as for adjustments to other factors. These adjustments would lead to much lower Schedule rates than Shaw has used for land-based equipment. The use of the Schedule's method for determining marine equipment rates would lead to even lower ownership costs for marine equipment than the Contracting Officer has allowed (and would still not provide a method for determining operating costs of the marine equipment).

Of course, Shaw is aware of the result if the Schedule is applied literally. Shaw does not really want to use the Schedule as is, despite the argument that it must be used because actual costs cannot be determined for each individual item of equipment. Shaw brought in an expert to present a revised method, using what Shaw considers to be the real value of the marine equipment, not its acquisition cost or book value. While we have personal respect for the expert, we reject the revised method. It is highly controversial at best, and it has no support in the contract. Many cases have held that, when acquisition costs are prescribed, other approaches to value, such as market value or replacement value, cannot be substituted. See, Ben C. Gerwick, Inc. v. United States, 152 Ct.Cl. 69, 131 1961); J.D. Shotwell Company, ASBCA No. 8691, 65-2 BCA 5243, at p. 24,689; Somerset

Construction Company, Inc., Corporation, ENG BCA No. 3516, 76-1 BCA 11,877. We also reject any attempt to substitute a non-prescribed method of estimating operating costs of marine equipment for the actual costs already available from Shaw's books.

The Board does not consider Shaw's presentation of alleged equipment costs (including its final position) to be valid in any event. The final total sought by Shaw for equipment (before markups) is $5,629,49735. This total includes $3,358,331.35 for active use and $2,271,166.00 for standby. These alleged costs are claimed for 167,171 hours of active use and 682,293 hours of standby, a total of 849,464 hours. Shaw overstates greatly the time period of recoverable costs and hours of use and standby per year. Dollar amounts are based on virtually untraceable assumptions by Mr. Shaw as to the determination and adjustment of rates from the Region I Schedule.

Shaw's presentation assumes that Shaw is entitled to charge against the job at least 40 hours of use or standby of each piece of land-based equipment and 168 hours of use or standby of each piece of marine equipment, for every week from the time Shaw expected to receive award of the contract, during mobilization, during performance of the job, and during several years thereafter, until it was able to obtain other work.

The Board rejects Shaw's unsupported formulaic concept of claiming active or standby costs for marine equipment for every hour that such equipment is allegedly committed to a job. This is a novel

concept and has not been shown to accord with any recognized principle of cost accounting for construction contracts. Furthermore, Shaw's concept of standby is completely flawed. The accepted concept of standby, as reflected in the Region I Schedule, is that the contractor is entitled to recover a portion of its ownership costs during a period of Government-enforced idleness of its equipment. As we stated in Lionsgate Corporation, ENG BCA No. 5388, 91-2 BCA 24,008, at

> The essence of a standby claim is that the contractor has been deprived of the productive use of its equipment by being compelled by circumstances for which the Government is responsible to keep the equipment idle. It is not enough that the equipment simply was idle because the contractor had no other use for it at the time. See, Excavation-Construction, Inc., ENG BCA No. 3858, 82-1 BCA 15,770, at p. 78,067. [Emphasis in original]

Construction Equipment - Post-termination Standby

Reasonable costs for post-termination standby of equipment are costs which may be recovered in connection with a termination for convenience of the Government. Nolan Brothers, Inc. v. U.S., 194 Ct.Cl. 1, 28-30, 437 F.2d 1371, 1386-1387 (1971). Shaw does not claim post-termination standby as such in this case. Rather, as noted above, its basic construction equipment claim assumes that every piece of equipment owned by Shaw or related entitles was on standby

whenever it was not being used, up to 40 hours a week for land-based equipment and 168 hours a week for marine equipment, from the date each such piece of equipment was "set aside" for this job until October 31, 1988, three years and eight months after the contract was terminated.

To the extent that some post-termination standby could be allowable, Shaw has not proved that there was any such standby. In any event, unlike Nolan, Shaw has already received more than sufficient payment for any post-termination standby by the Contracting Officer's allowance of the entire book value of all the equipment involved and, in addition, of acquisition costs in the case of fully depreciated equipment.

In summary, we do not increase the allowance for construction equipment costs, either as a matter of additional payment, which already capped by the contract price, or as a matter of determining Shaw's actual costs as they may relate to the determination of a loss contract or an indicated rate of loss.

Tri-County Sand & Gravel

Shaw did not present testimony at the hearing in direct support of the elements of Tri-County's termination for convenience proposal. Rather, the focus was on recovery from the Government of the amount of the arbitration award, together with a few other items as stated in the Findings. In general, judgments and arbitration awards are to be considered by Termination Contracting Officers under the terms of the

Defense Acquisition Regulation (DAR) applicable to this contract. DAR 8-209.5(b) provides:

> Where a contractor and his subcontractor submit a subcontractor termination claim to arbitration under any applicable law or contract provision, the TCO shall recognize the amount of the arbitration award as the cost of settling the claim of the subcontractor to the same extent and under the same conditions as specified in [DAR 8-209.5(a)].

DAR 8-209.5(a) provides:

> In the event a subcontractor obtains a final judgment against a prime contractor, the TCO shall, for the purposes of settling the prime contract, treat the amount of the judgment as a cost of settling with the subcontractor, to the extent such judgment is properly allocable to th terminated portion of the prime contract if:
>
> > (i) the prime contractor has made reasonable efforts to include in his subcontract the termination clause in 8-706 or a similar clause excluding payment of anticipatory profits or consequential damages;
> >
> > (ii) the provisions of the subcontract relating to the rights of the parties upon its termination, in whole or in part, are fair and reasonable and do

not unreasonably increase the common law rights of the subcontractor;

(iii) the contractor has made reasonable efforts to settle the claim of the subcontractor;

(iv) the contractor has given prompt notice to the TCO of the initiation of the proceedings in which the judgment was rendered and has not refused to give the Government control of the defense of the proceedings; and

(v) the contractor has diligently defended the suit or, if the Government has assumed control of the defense of the proceedings, has rendered such reasonable assistance as has been requested by the Government.

If the foregoing conditions are not all met, the TCO may allow the contractor part of the judgment as he considers a fair amount for settling the termination claim under the subcontract, giving due regard to the policies set forth in this Section VIII for settlement of such claims.

In view of these criteria and his analysis of the undrlying Tri-County termination claim, the Contracting Officer refused to recognize the arbitration award to Tri-County as a basis for a termination settlement with Shaw on the Tri-County aspects of Shaw's overall termination claim. As to the underlying settlement

proposal by Tri-County, submitted by Shaw on April 13, 1986, Contracting Officer's unilateral determination was issued and an appeal was filed. The audit did not support Tri-County's price as a ceiling had arisen, and no separate additional payment with respect to Tri-County was considered by the Contracting Officer.

Now, after conducting a hearing and studying the record, the Board is incredulous as to the actions of both Shaw and Tri-County with respect to both the arbitration proceedings and the underlying Tri-County termination settlement proposal. Contrary to Shaw's argument that the arbitration award must be accepted, the Board is convinced that it must not be accepted. Even on purely technical grounds, DAR Conditions (iii) and (v) have not been met, and the spirit of condition (iv) has not been met even if the letter has been.

As to Condition (iii), we see no reasonable efforts by Shaw to settle with Tri-County. Tri-County's termination settlement proposal, which formed the basis for Tri-County's presentation in the actual purchase order and the facts of performance under it, yet it appears that attorneys representing Shaw in earlier stages of these appeals assisted in preparing it, and Mr. Shaw certified it as "fair and reasonable, ... negotiated in good faith, and ... not more favorable to [Tri-County] than if the Government incorporation of Tri-County's proposal into its own termination settlement proposal raises a question of what there was left to arbitrate. If Shaw had really agreed with

Tri-County's proposal, as stated in the certification, Shaw could have reflected that effect, reserving the right it had under paragraph 18 of its purchase order to withhold payment until it had been paid by the Government. However, it is obvious that Shaw did not really believe that Tri-County was entitled to charge Shaw the amount sought from the Government. Shaw was simply willing to have th Government pay that much for Tri-County's termination, with proportionate markups for Shaw.

As to Condition (v), Shaw did not diligently defend against the arbitration. With regard to the actions of Shaw and Tri-County, the arbitration appears to have been a sham. If it was not, it nevertheless was so devoid of a reasonable defense as to make it valueless as a basis for any payment to Shaw for alleged costs related to the termination of this contract. Some of the questionable aspects of the arbitration proceedings include:

(i) The supposed rationale for agreeing to arbitrate in the first place. The purchase order incorporated the Disputes procedure of Shaw's contract with the Government, in the form of Shaw's sponsorship of Tri-County claims; it did not provide for arbitration It also provided that Shaw was liable to Tri-County on claims only when the Government paid Shaw, and only to the extent of such payments (less Shaw expenses, overhead, and profit). Both Mr. Shaw and Mr. Bettez testified that they chose arbitration in lieu of a Miller Act suit involving Shaw's payment bond

surety, supposedly to avoid damage to Shaw's ability to obtain future bonding. Yet, the one-year statute of limitations of the Miller Act (40 USC S270 a-3) had expired even before the termination settlement proposal was filed, which was long before Shaw and Tri-County agreed to arbitrate.

(ii) Shaw's failure to be represented by its attorneys. By Shaw's own assertions, approximately $4,000,000 was at stake in the arbitration procedings. Shaw consulted its attorneys on Tri-County and other matters, some much less significant, before, during, and after the arbitration proceedings. It defies belief that Shaw would permit itself to be exposed to such huge potential liability in the arbitration proceedings (far more than Shaw bid to perform all the work) without their assistance if Shaw believed it was defending its own interests. In this regard, Mr. Shaw testified that he had had his attorneys draft a clause for the arbitration agreement that he thought would protect Shaw against Tri-County using the arbitration award to get a judgment against Shaw.

(iii) Mr. Shaw's inadequate representation of the corporation in the arbitration proceedings. Mr. Shaw spent more effort persuading the arbitrator that the Government was being unfair to Tri-County and Shaw than in defending against what purported to be a serious claim that Shaw owed Tri-County far more than the

full purchase order price for producing less than one-third the quantity of stone that would have been needed for the complete project (which full amount Shaw would not have purchased anyway because of its partial use of salvaged stone under the VECP). Mr. Shaw did not raise the fair arguments that the purchase order clearly contemplated ordering less than the full amount of stone estimated for the complete project by providing a minimum price of $75,000 no matter how much stone was ordered, or that Tri-County had several times unilaterally increased the price or altered the terms of the purchase order, which indicated that neither Shaw nor Tri-County considered the purchase order to be a firm commitment of the total quantity of stone estimated for the entire project. Mr. Shaw did not point out that the termination regulations provided a basis to limit payment to the purchase order price, or that any changes that may have occurred on the jobsite did not affect Tri-County's operations. Mr. Shaw, even over his attorney's expressed opinion that the Government did not have title to any of the stone remaining at the quarry, joined in Tri-County's factually-erroneous assertion that the Government had never disavowed the ownership of the stone, and he ignored the fact that Tri-County had treated th stone as its own in attempting to sell it to other contractors and in using some of it for its stone crushing operation.

(iv) The role of Shaw's attorney as "assistant" to the arbitrator. It is difficult to assess the true status of the presence of Shaw's attorney at the second arbitration hearing. Even though he was paid by Shaw, and Shaw claimed reimbursement for his fees and expenses from the Government as settlement costs, the attorney maintained a distinction between his general role as Shaw's attorney and his supposed function at the arbitration hearing to assist the arbitrator but not to represent Shaw. It appears from the law firm's billings to Shaw, and from the letter to the American Arbitration Association dated February 18, 1987, that the firm assisted Tri-Count in the preparation of Tri-County's termination settlement proposal, the very document termination settlement proposal, the very document used by Tri-County in its presentation of its claims to the arbitrator. There could well have been an actual conflict of interest if Shaw's attorney had formally represented Shaw in defending against Tri-County's presentation, notwithstanding Tri-County's waiver of objection to such representation in the February 18, 1987 letter. It appears doubtful that Shaw's attorney was able to give objective assistance to the arbitrator under these circumstances, and the effect on the arbitrator's decision cannot be evaluated.

(v) Shaw's failure to pursue claims, counterclaims, and offsets against

Tri-County. In agreeing to arbitrate, Shaw reserved the right to pursue claims, counterclaims, and offsets against Tri-County, but Shaw presented the arbitration award to the Government for payment, marked up with percentage increases for itself, without pursuing any claims, counterclaims, or offsets. Although the exact nature of the claims, counterclaims, and offsets has not been disclosed to the Board, this is yet another doubtful aspect of the claim.

With respect to DAR Condition (iv), Shaw may have given technically promptly notice of the "initiation" of the arbitration proceedings, in the sense of the active pre-hearing and hearing phase of arbitration, and not then refused to give the Government control of Shaw's defense, but the proper time to have consulted the Government, if Shaw had had a bona fide desire to have the Government defend its interests against truly adversary interests of Tri-County, would have been before the real "initiation of the proceedings," which was Shaw's agreeing to arbitrate at all, and the establishment of the conditions of that arbitration. The use of arbitration in this case appears to have been designed to create a basis for Tri-County, and Shaw (through its markups), to collect far more for the supply of stone to the project than they could hope to negotiate with knowledgeable Government personnel or prove to a Board of Contract Appeals or to the Claims Court.

Notwithstanding our rejection of the

arbitration award as a basis for determining unrecovered costs of Tri-County arising from the termination, we recognize that Shaw, or Tri-County through Shaw, may have been able to present appropriate evidence that there were some such actual costs. However, they did not do so. It is not clear that there were such costs, and we are not inclined to speculate either that there were, or, if there were, how much they amounted to.

Specifically, we are not inclined to try to use a "jury verdict" approach with respect to Tri-County for several reasons. In the first place, we re not persuaded that Tri-County lost anything but anticipatory profits from the termination of Shaw's work, as discussed further below. Also, it is a time-wasting exercise to try to determine costs which Shaw cannot recover anyway, in view of the limitation of the contract price, already exceeded. Most importantly, however, even if we were to assume that there was some unrecovered cost effect on Tri-County, the United States Court of Appeals for the Federal Circuit has provided a jury verdict approach is not appropriate where a contractor has failed to present, or show that it could not present, reasonably available evidence that would make the "guesstimate" of a jury verdict unnecessary. See, Dawco Construction, Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991); J.W. Cook & Sons, Inc., ASBCA No. 39691, 92-3 BCA 25,053.

The evidence is vague in any event, and it is not clear that Tri-County incurred any unrecovered costs as a result

of Shaw's termination of the purchase order agreement. Tri-County had shut down related operations for the winter before the termination and did not resume them thereafter. As of February 2, 1985, after Tri-County had shut down its operations in support of Shaw, Tri-County Notified Shaw that a balance of only $14,604 (of a total second arbitration hearing, Shaw's actual payments to Tri-County were at least $162,655.

Tri-County may have incurred some up-front development costs in preparing a suitable quarry face, but most of those costs seem to have been incurred directly by Shaw. The development of the quarry face benefitted Tri-County's overall business, and was not solely for the Shaw contract. (This was a key factor in the defense of Shaw and Tri-County to the Labor Department charges of Davis-Bacon underpayments to their workers at the quarry. The participation minimum payment provision of the amended purchase order seem to have been the contemporaneous solution by Shaw and Tri-County to th possibility of Shaw ordering less than the full amount of stone needed for completion of the project (which was a certainty in light of Shaw's VECP). Also, Tri-County asserted in these proceedings that the tone in its quarry was worth much more than Shaw was paying for it. Whether or not this assertion is accurate, Tri-County got to keep the remaining stone.

Miscellaneous Rejected Costs

Shaw bears the burden of proving the allowability of all of its claimed costs,

including their incurrence, amounts, reasonableness, and allocability to this contract. We have studied the record and the briefs with respect to these miscellaneous rejected cost items. With few exceptions, Shaw has not persuaded us that the costs rejected (or, in some cases, partially rejected) by the Contracting Officer should be allowed. The principal exception is Contract Disputes Act interest, which we allowed in part in our order of June 16, 1989, and which we address further later in this opinion. Except for CDA interest, the result in this case will not be affected by these miscellaneous items because of the contract price ceiling. Therefore, it would serve no useful purpose to take the time and effort necessary to discuss and explain the details of our consideration of these other items.

Effect of Contracting Officer's Allowances on Contract Price

On June 16, 1989, we ruled on Shaw's motion for partial summary judgment as to Contract disputes Act (CDA) interest on the Contracting Officer's allowances. Tom Shaw, Inc., ENG BCA No. 5540 & 5541, 89-3 BCA 21,961. We granted the motion only to the extent of the existing contract price. We said, in part:

> ... the Termination for Convenience clause in this contract limits the total of payments under th contract, except for settlement costs, to the contract price. Payments, even excluding allowances for settlement costs, already exceed the total

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contract price as it now formally exists. While it may be argued that the Contracting Officer constructively increased the contract price by making payments in excess of it, he did not issue a modification increasing the price, and he did not address the question of the contract price as a limitation, or the question of whether finding costs in excess of it was intended as a recognition of changes and/or differing site conditions The factual and legal uncertainties involved in constructively increasing the contract price preclude resolving these questions in Shaw's favor in this summary judgment proceeding.

At the hearing, Mr. Carlson, who negotiated the allowances on behalf of the Contracting Officer, testified that the contract price was exceeded because there was at least one extant unquantified change and the Government was trying to be fair to Shaw. We accept the testimony of Mr. Carlson as establishing that the Contracting Officer knowingly made allowances that exceeded the contract price because of the possibility that an equitable adjustment for the change would raise th contract price. Although we do not believe that all such allowances by a Contracting Officer necessarily constitute constructive increases in a contract price, we hold that, in this case, the Contracting Officer intended to raise the contract price pro tanto to the extent of his allowances, and that it was within his authority to do so. Therefore, even though we have found no basis for us to raise the contract price, we do not question the

Contracting Officer's right to make payments here in excess of the formally established contract price.

Settlement Expenses

We have allowed settlement expenses in connection with negotiations for a termination for convenience settlement even after an appeal had been filed. See, E.W. Eldridge, ENG BCA No 4879, ____ BCA _____ (Opinion of July 29, 1992, p. 18). However, at the time the settlement expenses in that appeal were incurred, the parties were clearly in a normal "settlement mode" pursuant to the Termination for Convenience clause. Here, by way of contrast, the parties were in serious dispute about the amount being claimed, and that dispute existed before, during, and after negotiations. In fact, the Contracting Officer was negotiating under the compulsion of a Claims Court order, issued in litigation initiated by Shaw. Moreover, during much of the period of negotiations, there was a pending motion from Shaw for sanctions and contempt against the Corps and the Contracting Officer, personally. Yet, the Contracting Officer allowed $282,550 for settlement expenses, including $93,153 for the period during which the motion seeking sanctions and contempt was pending. He was very generous. We believe that the Contracting Officer would have been justified in allowing no settlement expenses for that period, if not for the entire period of negotiations, and we will not allow any further such alleged settlement expenses.

Loss Contract

Even without exact figures on the cost to complete the work, it is clear that Shaw "would have sustained a loss on the entire contract had it been completed," as that phrase is used in the termination clause. Only about twenty percent of the required stone had been placed, and most of that would have had to be reworked to make it acceptable, yet Shaw incurred costs that exceeded the established contract price. There is no way that the contract could have been completed without an overall loss deriving from the basic work, even given the fact that there would have been an equitable adjustment if Job Change No. 2 had been extended to the remaining work. (It seems unlikely that, if the work had not been terminated, the Government would have extended Job Change No. 2, the shift of the centerline, in light of the amount Shaw claimed for it.)

The Contracting Officer's Profit Allowance

Since this contract was a "loss contract," the Contracting Officer would have been operating within the terms of the termination clause if he had denied a profit allowance. Instead, he generously allowed $249,442.10 for profit. The remaining question is whether the Board should attempt to revise or eliminate this profit allowance. Although appeals to the Board on quantum issues usually involve de novo consideration of the amounts involved, a termination for convenience is somewhat different from he usual appeal. For example, the Board does not deal with the termination clause. Here, we have a complication in that the parties reached partial agreements followed by partial

payments 11 through 17, but the exact issues which were the subject of their partial agreements are not clear. It seems from Shaw's arguments that there was little more agreement as to a given payment than the Contracting Officer agreeing to pay and Shaw agreeing to accept the payment and demand more. However, the Contracting Officer never repudiated any of his allowances, and we do not view our ole in this case as involving second guessing the Contracting Officer's generosity to Shaw. Furthermore, even though the Contracting Officer designated a portion of the total amount he found due as profit, we have no independent basis for verifying most of the elements of that total. As in Harry Claterbos Co., JV, ENG BCA No. 5226, 92-2 BCA 25,010, at p. 124, 672, we treat the Contracting Officer's profit allowance as subsumed in the total amount found due rather than as a separate item of actual profit. We leave the profit allowance unchanged.

Reduction for Rate of Loss

The Government argues that we should make a reduction in the amount Shaw has already been paid on the basis that the costs recognized by the Contracting Officer are for only 20 percent of the work, so the total cost to completion would have been five times as much. The bottom line, although we do not follow the Government's actual calculations, is that the Government wants the Board to order a refund from Shaw of $2,607,820, or, alternatively, to use a "jury verdict" approach to reduce Shaw's recovery. We have no solid basis in evidence for determining the "indicated

rate of loss" pursuant to paragraph (e)(i)(C) of the termination clause, and do not attempt to reduce Shaw's recovery on the basis of a loss contract. Again, we leave the Contracting Officer's generous treatment of Shaw unchanged.

Contract Disputes Act Interest

Since we have determined that we will leave the Contracting Officer's allowances unchanged, we now consider whether any further interest is due in connection with those allowances. As noted above, we granted Shaw's motion for partial summary judgment as to Contract Disputes Act (CDA) interest only to the extent of the existing contract price. In light of our present decision, we see no basis to withhold CDA interest on the balance of the "amounts found due" by the Contracting Officer. Accordingly, Shaw is entitled to such interest from April 14, 1986, the date of receipt of the certified cliam, to the respective dates of payment of Payment Estimates 16 through 20, as reflected in Tab B-3 of the Rule 4 Appeal File. Since interest has already been paid on $324,047.13 of Payment Estimate 16, the balance of $303,697.28 from that payment estimate is subject to interest now, together with the full balances from Payment Estimates 17 through 20 We have calculated the interest due, and it amounts to $124,504.92.

Shaw's Application Under Equal Access to Justice Act

After our 1989 ruling on the Contract Disputes Act (CDA) interest issue, Shaw

filed an application for payment of $32,366.25 of attorneys fees and expenses pursuant to the Equal Access to Justice Act. We have no basis for action on such applications filed before an appeal has run its full course. Although we so informed the parties during pretrial proceedings, we did not formally reject the application as premature. We do so now. On the record already made, we state of the information of the parties that we consider the Government's position as to the CDA interest issue to have been substantially justified. Even to the partial extent to which Shaw prevailed at that time, there was ample support in decisions of other Boards of Contract Appeals and the Claims Curt for considering the Government's opposition to payment of any CDA interest to be reasonable under th circumstances. That we disagreed with the other decisions in this unsettled area of the law did not retroactively make the Government's position less than substantially justified.

Summary

ENG BCA No. 5540 is SUSTAINED IN PART, only to the extent that Shaw is entitled to $124,504.92 in Contract Disputes Act interest on the balance of the amounts previously found due by the Contracting Officer. It is remanded to the Contracting Officer for payment of that interest. ENG BCA No. 5541 is DISMISSED WITH PREJUDICE. ENG BCA Nos. 5620, 5621, 5622, 5623, 5624, 5625, 2626, 5627, 5628, and 5675 are DENIED.

Date: January 22, 1993

CHARLES J. SHERIDAN
Administrative Judge
Vice Chairman

I concur. With respect to the Tri-County claim and arbitration, I concur in the result. The arbitration award is wholly insufficient in this case to establish either the amount or allowability of any costs due Appellant.

I concur.

RICHARD C. SOLIBAKKE
Administrative Judge
Chairman

ROBERT T. PEACOCK
Administrative Judge

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I certify that the foregoing is a true copy of the decision of the Corps of Engineers Board of Contract Appeals on the Appeals of Tom Shaw, Inc., Docket Nos. ENG BCA 5540, 5541, 5620-5628, and 5675, Contract No. DACW33-83-C-0070.

Date: January 22, 1993

RUTH L. PRICE
Recorder

APPENDIX

GP-18. TERMINATION FOR CONVENIENC OF THE GOVERNMENT - CONSTRUCTION (1974 APR)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to tome in part, whenever termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under th contact is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

(i) stop work under the contract on the date and to the extent specified in the Notice of Termination:

(ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(iii) terminate all orders and subcontracts to the extent that they relate

to the performance of work terminated by the Notice of Termination;

(iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratifications of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government;

(vii) use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (vi) above; provided however, that the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further, that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered y this contract or paid in such other manner as the Contracting Officer may direct;

(viii) complete performance of such part of he work as shall not have been terminated by the Notice of Termination; and

(ix) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contact which is in the possession of the Contractor and in which the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in Section VIII, Defense Acquisition Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of

termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same; provided, that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer his termination claim, in the form and with certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless on or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such one year period or any authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or any extension thereof. Upon failure of the Contractor to submit his termination claim within the time allowed, the Contracting Officer may determine, on the basis of information available to him, the amount, if any, due

to the Contractor by reason of the termination and shall thereupon pay to th Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done; provided, that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree, as provided in paragraph (d), upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall pay to the Contractor the amounts determined by the

Contracting Officer as follows, but without duplication of any amounts agreed upon in accordance with paragraph (d):

(i) with respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of:

(A) the cost of such work;

(B) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in paragraph (b) (v) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of he Notice of Termination of Work under this date of the Notice of Termination of Work under this contract, which amounts shall be included in the cost on account of which payment is made under (A) above; and

(C) a sum, as profit on (A) above, determined by the Contracting Officer pursuant to 8-303 of the Defense Acquisition Regulation, in effect as of he date of execution of this contract, to be fair and reasonable; provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed

under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of he settlement to reflect the indicated rate of loss; and

(ii) the reasonable cost of the preservation and protection of property incurred pursuant to paragraph (b) (ix); and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the Contractor as the result of the termination of work under this contract. The total sum to be paid to the Contractor under (i) above shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor under (i) above, the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b) (vii).

(f) Costs claimed, agreed to, or determined pursuant to (c), (d), (e), and (i), hereof shall be in accordance with Section XV of the Defense Acquisition Regulation as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract

entitled "Disputes", from any determination made by the Contracting Officer under paragraph (c), (e), or (i) hereof, except that if the Contractor has failed to submit his claim within the time provided in paragraph (c) or (i) hereof, and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c), (e) or (i) hereof, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, the Contractor may file with the Contracting Officer a claim for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the

portion not terminated by the Notice of Termination(, and such equitable adjustment as may be agreed upon shall be made in such price or prices. Any claim by the Contractor for an equitable adjustment under this clause must be asserted within ninety (90) days from the effective date of the termination notice, unless an extension is granted in writing by the Contracting Officer.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97 for the Renegotiation Board, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting

Officer by reason of the circumstances.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor shall - from the effective date of termination until the expiration of three years after final settlement under this contract - preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all his books, records, documents and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof. (DAR 7-602.29(a))

TECHNICAL PROVISIONS (TP)

SECTION 2A - REHANDLING, RESHAPING AND FURNISHING NEW QUARRIED STONE TO REPAIR BREAKWATER

2A-1. SCOPE. The work covered by this section consists of furnishing all plant, labor, materials, and equipment, and performing all work required for rebuilding the Main Breakwater as specified herein and as indicated on the contract drawings. The work includes rehandling and resetting existing stone and furnishing and placing new quarried stone.

2A-3. MATERIALS.

2A-3.1. Quality of Stone. All stones shall consist of sound, hard, dense, durable rock which has been separated from bedrock in place by quarrying. Weight of stone shall not be less than 162 pounds per cubic foot, dry in air. The stone shall be of such quality that permanence in the structure is assured under all conditions to which it will be subjected. The stone shall be free from open or incipient cracks, seams and fissures, and from porous structure, solution cavities, structural planes of weakness and from component minerals and cementing or bonding materials that might contribute to spalling or breakdown from handling and placing, and from wave action and chemical action from water or air. No stone shall be used in which the least principal dimension is less than one third of the greatest dimension. Slabs, boulders and round stones will be rejected. The stone shall, in general, be of irregular and angular shape; however,

not more than 25% may be roughly rectangular, provided such stone is placed with its long axis perpendicular to the side slopes.

2A-3.2. Quarried Stone. The stone for the main breakwater shall be furnished in two sizes, in pieces weighing from 2 to 5 tons and 12 to 15 tons.

2A-3.3. Sampling of Rock. The sources from which the Contractor proposes to obtain the rock required for the features covered in this section shall be selected well in advance of the time when the materials will be required in the work. Suitable samples of the proposed materials of the rock prior to delivery of any such material to the site of the work. All test samples shall be obtained by the Contractor and delivered at his expense to the New England Division Materials Testing Laboratory in Waltham, Massachusetts as soon as possible in advance of the time when the placing of the material is expected to begin. The Contractor shall submit three samples weighing not less than 20 pounds each, of the stone he proposes to furnish. The samples shall be representative the whole quarry and include materials from distinctive strata and bed. If it is proposes to furnish stone from more than one quarry, samples, as required above, shall be furnished from each quarry. The samples shall be suitably identified by number and quarry name. Submittal of samples shall be accompanied by letter, in triplicate, setting forth sample designations, name of quarry, ownership of quarry, location of samples from within the quarry, method of sampling, and if

available, record and method of tests, geologic descriptions, and history of use n marine construction. In the event the Contractor proposes to furnish stone from an undeveloped source, or a source open by minor quarrying or prospecting, the area proposed for development shall be adequately explored and sampled to the satisfaction of the Contracting Officer by means of "NX" (3") site core-drilling to the limits and full depths of expected production. The Contractor shall locate the borings by surveys and the entire footage of recovered cores shall constitute the samples and shall be suitably bored and marked as to elevations, depths, and core losses. Submittal of core samples shall be accompanied by 3 copies of plan showing locations and elevations of borings together with detailed logs of boring operations. Drilling, blasting, and sampling of stripped or naturally exposed areas of the bedrock surface which present prominent faces suitable for trial quarrying may serve as a partial alternative to the core drilling method of exploration and sampling as approved by the Contracting Officer.

2A-3.4. Testing and Approval for Quality for Rock. The acceptability of the rock may be determined from existing test reports, service records, and by geologic examination of samples and of the quarry. In the case of sources not having suitable test reports or service records, such as newly opened, or long abandoned quarries and undeveloped sources, the material will be subject to the work. The tests to which the materials may be subjected include petrographic analysis, specific gravity,

abrasion, absorption, sulfatesoundness, wetting and drying, freezing and thawing, compressive strength, and such other tests as may be considered necessary to demonstrate to the satisfaction of the Contracting Officer that the materials area acceptable for use in the work. All tests will be made by or under the supervision of the Government and at its expense. Approval of any source of stone shall not be construed as approval of all the stone localized area, strata, or channels within the approved source when, in the opinion of the Contracting Officer, the stone is disintegrated, badly weathered or otherwise unsatisfactory for use in the work. Any retesting and all testing of subsequent sources due to the initially proposed source failing to meet the requirements of the specifications will be done by the government at the contractors expense. All stone will be subject to inspection during loading at the source and at the site of the work prior to placement. Any stone rejected at the site of the work as not meeting the requirements of these specifications for quality, conditions, size, gradation or otherwise, shall be removed from the site by and at the expense of the Contractor, and stone of suitable quality shall be furnished and placed at no additional cost to the Government.

2A-4. PLACEMENT-

2A-4.1. General.

2A-4.1.1. Prior to the placement of any material, the Contractor shall establish construction control markers clearly visible and understandable to the

workmen placing the material. Any temporary construction roadway or fill which the Contractor may elect to build to facilitate his operations shall be removed and the rough surface of stone restored.

2A-4.1.2. In areas designated by the Contracting Officer for placement of armor stone, existing adjacent and underlying stone shall be removed as necessary to incorporate this new work and shall be reset as part of the work to insure interlocking of all stone.

2A-4.1.3. Contractor shall provide a temporary platform, dock or other suitable facility for safe access to and from the breakwater by inspectors during construction. This facility shall be removed and become the property of the Contractor at completion of the work. A workboat shall be available on site at all times for safety and transportation of the crew. Walkie-talkie or similar communication shall be provided between the trailer onshore, the workboat and the crew working on the breakwater. In addition the Contractor shall provide transportation for the exclusive use of the Government inspector consisting at a minimum of a 16-foot whaler or equivalent, powered, at a minimum, by a 20 HP motor.

2A-4.1.4. All costs associated with this work shall be included in the contract price for the items comprising the bid schedule.

2A-4.1.5. All existing undisturbed and well interlocked stones in repair areas and in non-repair areas, regardless of

size, that must be temporarily moved or leveled only to facilitate the use of equipment on the breakwater will be reset and properly interlocked.

2A-4.2. Minor Repairs. Minor repairs are required along the west arm from the west end light to Sta. 43+00 to east end light.

Repairs consist of the placement of 2 to 5 ton stone and 12 to 15 ton stone in the areas shown on the Contract Drawings. These areas generally require the placement of small quantities of stone at isolated damaged areas and minor resetting of adjacent and underlying stone.

2A-4.3. Major Repairs. Major repair of the breakwater is required between Station 20+34± and Station 43+00±, requiring the removal and/or resetting of existing armor stone, the placement of a new cover layer of 12 to 15 ton stone and the placement of core stone. Stone needed to rebuild the core section shall be salvaged from the harborside of the breakwater. Existing 12 to 15 ton stone within the design section shall be salvaged and reused in the new over layer. Some minor excavating of sand may be required to set some of the toe stones on the harbor side. In areas where the top of the breakwater is between 15 and 20 feet wide and the breakwater section is undisturbed and well interlocked, no work will be performed.

2A-4.4. Cover Stone. Each [12 to 15 ton] stone either in the minor repair area or major repair area shall be placed

individually be equipment suitable for lifting, manipulating, and placing stone of the size specified. Each stone shall be selected with care as to the size and shape, and placed to obtain firm contact with the maximum number of adjacent stones in order to obtain the best possible interlocking. The stone shall be laid with its longest dimension perpendicular to the length of the structure. The cover stone is to be left rough with placing efforts concentrated on insuring that each stone is firmly set and well supported by underlying and adjacent stones. Obtaining a smooth face is neither necessary nor desirable, and will not be permitted. The surface of the armor slope stone shall be constructed within a tolerance of plus 18 inches or minus 12 inches from the slope lines delineated on the drawings. Neither extreme of these tolerances shall be continuous with placement of adjacent stones to ensure that the average tolerance is no more than 6 inches from the design line. Stones placed beyond the specified limits, as herein extended, will not be paid for and may be required to be removed. Rectangular stone will be placed with it's [sic] long axis perpendicular to the side slope.

2A-4.5. Salvaged Stone. Existing 12-15 ton stone lying outside the design section shall be salvaged and incorporated into the work. Smaller stone that cannot be utilized in the work may be salvaged at the discretion of the Contractor and removed from the site. [Added by Modification No. P00001]

2A-5. MEASUREMENT AND PAYMENT.

2A-5.1. Measurement

2A-5.1.1. The unit of measurement for stone furnished and placed in the finished work will be the ton of 2,000 pounds. Stone will be measured by one or more of the following methods.

2A-5.1.2. Stone delivered by truck from the quarry to tidewater, and then transferred to barges, shall be weighed on approved scales, either at the quarry or the dockside, which have been tested and sealed by the properly authorized sealer of weights and measures. The stone shall be weighed in the presence of a properly authorized sworn weigher. The original weight slip for each truck load, certified by the sworn weigher and prepared in ink or indelible pencil, shall be furnished to the Contracting Officer or his representative. The slip shall show the delivery date, the truck number and the gross, tare and net weight of stone in each truck load. If there is, in the opinion of the Contracting Officer or his representative, any questions as to whether such weight slip correctly represents the quantity of stone delivered to the site of work, he may require that the loaded truck by reweighed on another approved scale. Should there be a variance in the weight as shown on the original weight slip and the weight as determined on the reweighing, the latter weight shall be accepted as correct.

2A-5.1.3. If stone is delivered by rail to tidewater, and thence transported by barge to the work site, a railroad freight bill will be accepted in place of a certified truck weight slips. Such bill

will show the gross, tare, tonnage allowance and net weight of stone in each car. It will also show to whom the delivery is being made, the original and terminus of car travel, th date of car arrival and its terminus, and the car number and initials.

2A-5.1.4. Stone delivered by truck from the quarry to the site of work shall be weighed on approved scales, either at the quarry or the job site, which have been tested and sealed by the properly authorized sealer of weights and measures. The stone shall be weighed in the presence of a properly authorized sworn weigher. The original weight slip for each truck load, certified by the sworn weigher and prepared in ink or indelible pencil, shall be furnished to the Contracting Officer or his representative. The slip shall show the delivery date, the truck number and the gross, tare and net weight of stone in each truck load. If there is , in the opinion of the Contracting Officer of his representative, any questions as to whether such weight slip correctly represents the quantity of stone delivered to the site of work, he may require that the loaded truck be reweighed on another approved scale. Should there be a variance in the weight as shown on the original weight slip and the weight as determined on the reweighing, the latter weight shall be accepted as correct.

2A-5.1.5. Weight may be determined by computing displacement of vessel used to transport stone to the site of the work. Measurements of hull of the vessel, necessary for computing the change in displacement due to each load, will be made

at the proper times by a representative of the Contracting Officer. The weight of fresh water shall be taken as 62.4 pounds per cubic foot, and the weight of sea water shall be taken as 64.2 pounds per cubic foot.

2A-5.2. Payment.

2A-5.2.1. Payment for all new stone will be made on the basis of the number of tons, determined as described in the above subparagraphs acceptably placed in the structure. Payment for stone will be made at the contract unit price for items 1 and 2, which price shall be full compensation for furnishing and placing all materials and performing all work as specified herein, including weighing of stone and certification by a sworn weigher, all rehandling, resetting and reshaping existing stone, mobilization, demobilization and clean-up.

2A-5.2.2. Correctional Factor for Stone Used. Should stone weighing more than 170 pounds per cubic foot in dry air be used in the structures, a correction in the tonnage shown on the weight certificates or the computation of displacement of vessel will be made. The tonnage to be paid for shall be the number of tons proportionately corrected, using 170 pounds per cubic foot as the base correctional factor. No correctional factor will be made for stone weighing between 162 to 170 pounds per cubic foot.

2A-5.2.4. Payment for rebuilding the breakwater core with existing small and medium size stone from sta. 20-34± and sta.

43+00± shall be made as a lump sum amount in Item No. 3 of the Unit Price Schedule.

2A-5.2.5. Payment for salvaging and resetting existing 12 to 15 ton stone within the design section from Station 20+34± to Station 43+00± shall be made as a lump sum amount in Item No. 4 of the Unit Price Schedule.

2A-5.2.6. Payment for salvaging 12-15 ton stone outside the design section and incorporating it into the work will be made at eh unit price for Item No. 5, "Salvaging 12-15 ton stone outside the design section." [Added by Modification No. P00001]

2A-5.2.7. Payment for the Contractor's share of VECP No. 1 will be made at the unit price for Item No. 6, "Salvaged stone as a result of BECP No. 1." [Added by Modification No. P00001]

2A-6 DREDGING The Contractor will be allowed to dredge and sidecast material to obtain access to the breakwater. Sidecasting of material will be controlled to limit shoaling and sidecast material will be returned to its original location following the completion of work.

Supreme Court, U.S.
FILED
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No. 95-184

In the Supreme Court of the United States

OCTOBER TERM, 1995

TOM SHAW, INC., PETITIONER

v.

TOGO WEST, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly found: (a) that the facts of this case and the specific terms of petitioner's fixed-price contract with the government precluded further recovery by petitioner, pursuant to a termination of the contract for the convenience of the government; and (b) that the contract contemplated evidence of actual, rather than estimated, costs in support of such recovery.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is not reported, but the decision is noted at 41 F.3d 1520 (Table). The opinion of the Corps of Engineers Board of Contract Appeals (Pet. App. 1-148) is reported at 93-2 BCA ¶ 25,742.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1994. The petition for a writ of certiorari was filed on February 13, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into a contract with the United States Army Corps of Engineers (government or Corps) calling for repairs to a breakwater in Point Judith, Rhode Island. The contract was a fixed-price type construction contract with an initial contract price of $2,304,249.40. Pet. App. 2-3.[1] A bilateral modification executed during performance reduced the contract price to $2,274,749.40.

The contract called for both minor and major repairs to an existing breakwater between the Atlantic Ocean and Block Island Sound. The "minor" repairs consisted of placement of stones along both sides of the existing breakwater structure. Pet. App. 4. The "major" repairs required rebuilding several complete voids in the existing breakwater. Placement of the stones in such a breakwater "approaches an art." *Id.* at 6. As the Corps of Engineers Board of Contract Appeals (ENGBCA) explained, "[t]he principal challenge is to evaluate the holes to be filled, to visualize the best stones * * * available * * *, and to manipulate the stones so that they achieve optimum interlocking." *Ibid.* The contract specifications illustrated this process by describing various acceptable stone shapes, placements, and tolerances. *Id.* at 6-7.

The contract included a number of standard government contract clauses, including a "Termination for Convenience of the Government" clause. Pet. App. 3.

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[1] Types of government contracts include fixed-price contracts, which establish the price in advance, see 48 C.F.R. Subpt. 16.2, and cost-reimbursement contracts, which estimate total costs but pay on an incurred-cost basis, see 48 C.F.R. Subpt. 16.3.

Under that clause, if the government terminates the contract for convenience, the contractor is entitled to payment for the work performed prior to termination and a fair and reasonable profit on that work. *Id.* at 132-134. This payment is subject to the limitation that the total sum paid to the contractor during performance and at termination cannot exceed the total contract price. *Id.* at 132, 134.

With regard to changes that required an "adjustment in contract price," the contract included a provision, Clause SP-33, that identified a manual containing a standard equipment cost schedule. That schedule was to be used to ascertain estimated equipment costs in connection with contract price adjustments "[w]henever actual ownership and operating costs for each piece of equipment or equipment groups of similar serial and series cannot be determined by the Contracting Officer from a contractor's accounting records." Pet. App. 54. For marine equipment, the schedule did not include specified costs, but described a methodology for determining the ownership expense of such equipment when it could not be ascertained from the contractor's accounting records. *Id.* at 57.

2. Petitioner's initial work in stone placement was rejected by the Corps as unacceptable. Pet. App. 12. In response to complaints by petitioner that the existing voids on the seaward side of the breakwater were too small to accommodate the replacement stones, the Corps altered the centerline of the planned configuration by about 2-1/2 feet to the seaward side. This had the effect of allowing more space for petitioner to fill the holes on the seaward side and eliminating construction of a planned

new slope on the harbor side of the breakwater. *Id.* at 16-17.

A subcontractor retained by petitioner briefly performed some satisfactory work in placing stones on the breakwater, but, after termination of that subcontractor by petitioner, petitioner continued to be unable acceptably to place stones on the project. Pet. App. 23-24. The parties held a series of meetings and exchanged voluminous correspondence regarding the progress of work. At one of those meetings, petitioner requested either additional funding of petitioner's continued performance through formal changes to the contract or a termination for the convenience of the government. *Id.* at 29.

The Corps' contracting officer then terminated petitioner's right to proceed for the convenience of the government. Pet. App. 29. In response to the termination, petitioner submitted a settlement proposal and a certified claim seeking $9,175,285.28 in costs, profits, and settlement expenses for itself and $2,131,896.88 for its suppliers. *Id.* at 33.[2] More than 20 meetings were held between representatives of petitioner and the government, in an effort to agree upon final compensation for the convenience termination. A series of payments was made by the government to petitioner, reflecting partial agreements

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[2] The jurisdictional scheme of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, requires a contractor to file a certified claim with the contracting officer. Upon full or partial denial of that claim, the contractor can pursue a *de novo* proceeding before an agency board or in the United States Court of Federal Claims. Appeals from either forum may be taken to the United States Court of Appeals for the Federal Circuit.

reached during those negotiations. *Id.* at 34-35. The total paid to petitioner during the performance and settlement periods eventually exceeded the adjusted contract price of $2,274,749.40. Petitioner continued to assert its entitlement to additional costs in excess of $10 million, but the contracting officer granted no further relief.

3. Petitioner appealed to the ENGBCA, which held a three-day hearing in Michigan and a ten-day hearing in Boston, Massachusetts. Petitioner had filed a number of separate claims with the contracting officer, alleging various grounds for increasing the contract price. All of those claims were consolidated and considered in the single appeal to the ENGBCA.

The ENGBCA issued a detailed opinion, in which it rejected all of petitioner's claims for further payments (with the exception of certain Contract Disputes Act interest not at issue here). The ENGBCA held that the "Termination for Convenience of the Government" clause precluded recovery in excess of the contract price unless petitioner proved a basis for increasing the contract price, Pet. App. 88, and found that petitioner had failed to meet that burden, *id.* at 101-102. The ENGBCA considered and rejected each of the alleged changes in performance that petitioner maintained mandated an increase in the contract price. *Id.* at 53. It also held that under Clause SP-33 of the contract, petitioner's recovery for marine equipment was properly based on its actual book figures rather than on the estimated costs schedule. *Id.* at 104.

4. Petitioner appealed to the United States Court of Appeals for the Federal Circuit, which summarily

affirmed the ENGBCA's decision without opinion. Pet. App. 1.

ARGUMENT

The court of appeals properly rejected petitioner's challenge to the factual findings and legal conclusions of the ENGBCA. The ENGBCA correctly found that the facts of this case and the specific terms of petitioner's contract precluded further recovery of costs by petitioner. The ENGBCA also correctly found that the contract contemplated submission of actual, rather than estimated, cost evidence. No basis existed for the court of appeals to disturb those findings.

1. The standard termination clause included in the government contract in this case provides that, upon a termination of the contract for the convenience of the government, the contractor shall receive certain costs, but that those costs "shall not exceed the total contract price." Clause GP-18(d) (Pet. App. 132). See also 48 C.F.R. 49.207 (when fixed-price contracts are terminated for convenience, the "[t]otal amount payable to the contractor for a settlement * * * must not exceed the contract price less payments otherwise made or to be made under the contract").

Petitioner does not dispute the general validity of the clause establishing the contract price as a ceiling,[3] but advances two arguments in support of its

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[3] Petitioner asserts, without explanation, that "[a] termination for the Government's convenience converts a fixed price contract to a cost reimbursable contract." Pet. 24. The meaning of that assertion is not clear. There are parallels between the payments due a contractor under a fixed-price contract terminated for convenience and a cost-reimbursement contract, but in neither case is recovery unlimited. Thus, under the Federal Acquisitions Regulations, the government's termina-

contention that the ceiling should be disregarded in this case: (a) that an assortment of alleged changes in the conditions of performance mandate that the contract price be raised, Pet. 2-4, 14-16, 31; and (b) that the ENGBCA's "evaluation of [p]etitioner's work product was improper," Pet. 34.

a. There are a variety of circumstances that can result in an increase in the price of a government contract, including defective specifications, government-caused delays, or constructive changes. If such circumstances are established by a contractor and shown to have caused costs to be incurred prior to the termination of the contract, they can effectively raise the contract price ceiling on a contractor's termination-for-convenience recovery. Pet. App. 88. Petitioner urged a number of such circumstances below, and repeats some of those assertions here.

The ENGBCA exhaustively addressed the grounds argued by petitioner as having constructively increased the contract price ceiling. For example, the facts regarding the shift of the centerline (which petitioner argues would have increased costs by causing more work to be done on the seaward, rather than harbor, side of the breakwater, Pet. 2-4, 32) were described in detail and documented by the ENGBCA.

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tion for convenience of a fixed-price contract entitles the contractor to be "compensate[d] * * * fairly for the work done and the preparations made for the terminated portions of the contract." 48 C.F.R. 49.201(a). But "[t]he total amount payable to the contractor * * * must not exceed the contract price." 48 C.F.R. 49.207. Likewise, a cost-reimbursement contract "provide[s] for payment of allowable incurred costs" but "establish[es] a ceiling that the contractor may not exceed." 48 C.F.R. 16.301-1.

E.g., Pet. App. 39-44, 96-97.[4] Because the centerline shift did not raise the cost of contract performance, however, the ENGBCA properly held that it could not result in an increase of the contract price ceiling. *Id.* at 96-97.

The high burden on a party attempting to overturn the factual findings of an agency board of contract appeals is established by statute and supported by a number of authorities. See 41 U.S.C 609(b); *United States* v. *Boeing Co.*, 802 F.2d 1390, 1393 (Fed. Cir. 1986); *Erickson Air Crane Co. of Washington, Inc.* v. *United States*, 731 F.2d 810, 814 (Fed. Cir. 1984); *Jefferson Constr. Co.* v. *United States*, 368 F.2d 247, 252 (Ct. Cl. 1966). The court of appeals' determination not to disturb the factual findings in this case was plainly justified and fully in accord with governing principles.

b. Petitioner's extended discussions of the ENGBCA's evaluation of its performance and whether a contractor's termination-for-convenience recovery may be reduced when the contractor is in a loss position on the contract, *e.g.*, Pet. 9, 12-13, 21, 29-

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[4] Specifically, the ENGBCA found that (i) the shift of the centerline did not cause petitioner to perform additional work on the seaward side of the project prior to the termination, Pet. App. 40; (ii) petitioner's bid was erroneously based upon non-representative cross-sections on the contract drawings, and petitioner should have recognized the scope of work to be done on the seaward side, *ibid.*; (iii) petitioner should have discovered any discrepancy through a site visit, and the contract provided that petitioner was assuming such risk, *id.* at 42; and (iv) petitioner's claim of resulting increased costs failed for lack of proof, *id.* at 44.

31, 33-35, 52, 54, 56, are misdirected. The ENGBCA expressly stated:

> The termination of the contract for convenience limits the significance of the Board's findings as to the acceptability of the work actually performed by [petitioner]. Although the Board has found that the Government was correct to the extent that it rejected [certain work,] [petitioner] nevertheless became entitled to payment for that work by virtue of the termination and the consequent requirement that [petitioner] be paid the total of its allowable costs under the contract, plus a fair and reasonable profit and settlement costs.

Pet. App. 37. The ENGBCA further explained that it was "leav[ing] the profit allowance unchanged," *id.* at 124, and not "attempt[ing] to reduce [petitioner's] recovery on the basis of a loss contract. Again, we leave the Contracting Officer's generous treatment of [petitioner] unchanged." *Id.* at 125.

Thus, even though it is clear that petitioner was in a loss position on this contract, the ENGBCA left the Contracting Officer's profit allowance intact. Petitioner was not denied recovery of any of its costs on the basis of its unsatisfactory performance.

2. Finally, the ENGBCA's use of actual evidence of equipment costs, rather than estimated figures, was fully consistent with the contract and with established principles of proof.

a. Petitioner argues that Clause SP-33 mandates the use of estimates here because certain of its costs were not allocable to specific pieces of equipment. Pet. 35-49. As a factual matter, however, the ENGBCA found that accurate, aggregate equipment

costs *were* ascertainable from petitioner's records, *e.g.*, Pet. App. 103, 104, and that application of the estimated cost schedule identified in SP-33 would not have increased petitioner's compensation, *id.* at 60-61, 105-106. Moreover, the law and the language of the contract clause itself express an unmistakable preference for actual cost evidence. *E.g.*, *Dawco Constr., Inc.* v. *United States*, 930 F.2d 872, 881 (Fed. Cir. 1991); *Meva Corp.* v. *United States*, 511 F.2d 548, 559 (Ct. Cl. 1975).

b. Petitioner further claims that it is entitled to recover opportunity costs it incurred by keeping this equipment idle during the post-termination period. Pet. 44. The ENGBCA recognized that a contractor may recover under a "standby claim" where "the contractor has been deprived of the productive use of its equipment by being compelled by circumstances for which the Government is responsible to keep the equipment idle." Pet. App. 108 (quoting *In re Lionsgate Corp.*, 91-2 BCA ¶ 24,008, at 120,163 (ENG BCA 1991)). The ENGBCA concluded, however, that petitioner "has not proved that there was any such standby." *Id.* at 109. This fact-based determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
Attorneys

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